REPORTS

OF THE

NATIVE APPEAL COURTS

1955 (4)

VERSLAE

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NATURELLE-APPÈLHOWE

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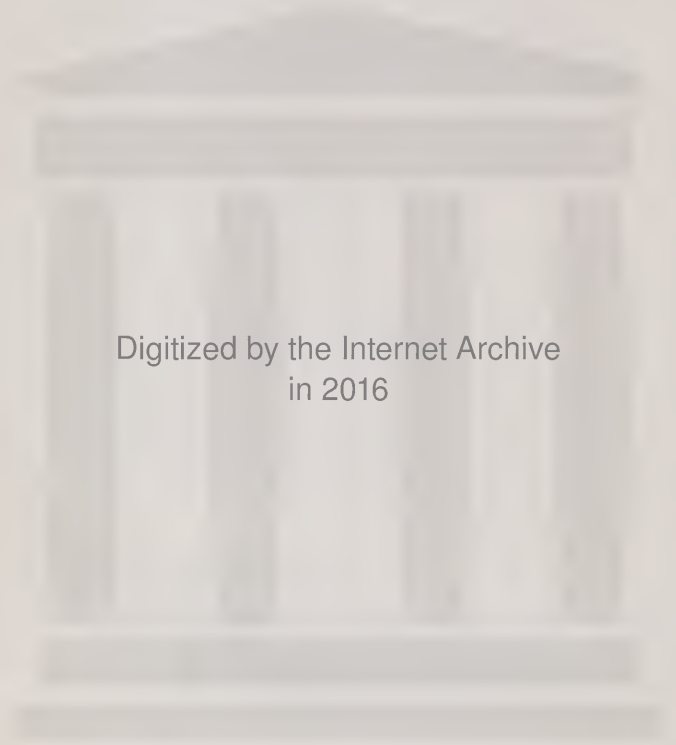

NORTH-EASTERN NATIVE APPEAL COURT.

NDHLOVU *v.* NDHLOVU.

N.A.C. CASE No. 12/55.

VRYHEID: 4th October, 1955. Before Steenkamp, President, Ashton and Craig, Members of the Court.

(a) PRACTICE AND PROCEDURE.

Application for condonation of late noting—Verbal application for postponement to prepare a further application.

(b) ZULU CUSTOM.

House property excluded from assets which may be disposed of by will.—res judicata.

Summary: (*a*) A verbal application for postponement to enable preparation of a further application for the Court to set aside the judgment appealed from and remit the case to it for hearing of further evidence refused on the same grounds as were given in the cases Mangwane *v.* Executor late Mangwane, 1 N.A.C. (N.E.), 243 and Dube *v.* Dube 1 N.A.C. (N.E.) 252 and Colman *v.* Dunbar, 1933, A.D. 141.

Summary: (*b*) A father made a will disposing of his assets to members of his family excluding the plaintiff who was the heir to his second house and including defendant, the heir to the first house. Some of the property willed was house property. It was sought to show that the claim was *res judicata* because the ownership of certain of the cattle was said to have been gone into by a Chief and a Native Commissioner who had made orders in this regard.

Held: (1) That the *lobolo* paid for a daughter in the house of which plaintiff was the heir was house property and plaintiff was entitled to what was left of it at the time of his father's death.

Held: (2) That if a previous order of a Native Commissioner or a Chief is sought to be upheld against a legally justifiable claim it must be shown that the Order was made as a result of a civil action.

Cases referred to:

Mangwane *v.* Executor late Mangwane, 1 N.A.C. (N.E.), 243.

Dube *v.* Dube, 1 N.A.C. (N.E.), 252.

Colman *v.* Dunbar, 1933, A.D., 141.

Appeal from the Court of the Native Commissioner, Nqutu.

Ashton (Permanent Member), delivering the judgment of the Court:—

The appeal noted by defendant against the judgment of the Assistant Native Commissioner in this matter was not noted in time and was struck off the Roll by this Court at an earlier session. Application has now been made for an extension of time within which to note the appeal and it is granted.

After the late noting of the appeal was dealt with counsel for appellant made verbal application for the postponement of the hearing to enable him to prepare a further application for the Court to set aside the judgment of the Assistant Native Commissioner and remit the case to him to hear further evidence.

The reasons advanced for the application were not such that this Court could entertain it and to show why, it is necessary only to refer to the relevant passages in the cases Mangwane *v.* Executor late Mangwane, 1 N.A.C. (N.E.) 243 and Dube *v.* Dube, 1 N.A.C. (N.E.), 252, as well as to the case quoted therein Colman *v.* Dunbar, 1933, A.D., 141.

Plaintiff's claim after amendment was for fourteen head of cattle or their value These cattle were stated to be among the assets of the father of the parties at his death and their number was made up of—

(*a*) five oxen at £20 each and one cow at £9 and to increase stated to be what was left of a gift by the father of the parties to plaintiff; and

(*b*) four oxen at £20, one cow at £9 and 1 calf at £8 stated to be what was left of the *lobolo* of plaintiff's sister.

The father of the parties had two wives and plaintiff is the heir of the second house while defendant is the heir of the first wife. During the father's lifetime plaintiff established his own kraal and his father allowed him to take eight head of cattle from the main kraal. Thereafter plaintiff and his father quarrelled and the latter took his cattle back. In the meantime plaintiff's sister Sannie married and her *lobolo* was with the father's consent taken by plaintiff but when the quarrel took place the father took the cattle back together with the "gift" cattle.

At the time of the death of the father the "gift" cattle numbered five oxen and one cow and the "Sannie *lobolo*" cattle numbered four oxen, one cow and one calf. Apparently the father did not wish plaintiff to succeed to any of his estate for he left what is described as a will excluding him from any legacy and disposing of his assets otherwise. But he did not take into account the provision of the law which excludes house property from the assets which may be disposed of by will and it is clear that the *lobolo* paid for Sannie falls into this category and equally clear that plaintiff is entitled to what is left of it. The Assistant Native Commissioner gave judgment for the full amount prayed and there can be no doubt that he was right in awarding plaintiff the four oxen, one cow and one calf or £97 being the "Sannie *lobolo*" cattle if the previous judgment (to be mentioned later) did not preclude such an award.

The appeal is made on the following grounds:—

"1. That the judgment is against the weight of evidence.

2. That respondent did not prove the alleged gift to the *Kohlo* house section of his father's kraal.

3. That respondent previously brought actions for the subject of the claim against his father and was defeated in his claim or claims, and the judgments are neither rescinded nor upset."

The appeal must succeed in so far as the "gift" cattle are concerned if a previous judgment concerning them did not preclude an award for their return. That "judgment" is referred to in plaintiff's evidence—"I returned both lots of cattle i.e. balance of original eight and balance of *lobolo* cattle as a result of Court Orders. The orders were made by Chief Sibeniseleni. The cattle in respect of Sannie's *lobolo* were returned as a result of an order made by the Native Commissioner" but there is nothing to show that the matters were tried as civil cases and consequently the orders made could not be upheld against a legally justifiable claim.

In the circumstances paragraph No. (3) of the Notice of Appeal falls away. It must be conceded too that an outright gift of the eight head of cattle by the father to plaintiff was not established more especially as the father took them back in his lifetime.

In these circumstances the appeal must succeed as to part only of the judgment of the Assistant Native Commissioner.

It is ordered that the appeal be and it is hereby allowed with costs. The judgment of the Assistant Native Commissioner is set aside and for it is substituted:—

"Judgment for plaintiff for four oxen, one cow and one calf or their value £80, £9 and £8 respectively and costs."

For Appellant: Mr. Havemann of G. D. Havemann & Co.

For Respondent: Mr. Schoombie of Bestall & Uys.

NORTH-EASTERN NATIVE APPEAL COURT.

ZULU *v.* ZULU.

N.A.C. CASE No. 26/55.

VRYHEID: 5th October, 1955. Before Steenkamp, President, Ashton and McCabe, Members of the Court.

ZULU CUSTOMARY LAW.

Indhlunkulu *property not same as kraal property—How* lobolo *accrues to* indhlunkulu—*Property which accrues to heir.*

Summary: Plaintiff sued defendant for twenty-six head of cattle which he declared were used by defendant from their father's estate to which plaintiff was *indhlunkulu* heir. Defendant denied liability on the ground that their father *lobola'd* his first wife for him with eleven head and that fifteen head came from a house to which plaintiff was not heir.

Held: (1) The *lobolo* of the first born daughter of each of the several wives of the father of the parties accrued to the *indhlunkulu* and so became the property of the *indhlunkulu* heir.

(2) *Indhlunkulu* property is not the same as kraal property.

(3) Kraal property is property which is not house property.

(4) The *indhlunkulu* heir succeeds to kraal property.

(5) Before it can be accepted that one house is affiliated to another it must be properly proved.

Appeal from the Court of the Native Commissioner, Nongoma.

Ashton (Permanent Member), delivering the judgment of the Court:—

Plaintiff sued defendant in a Chief's Court for twenty-six head of cattle which he declared were used by defendant out of their father Bejane's estate to which plaintiff is the *indhlunkulu* heir. Defendant denied liability pleading that eleven head were paid by Bejane for his first wife and the fifteen head used for his second wife came from the *lobolo* of the sister of Hlinzumuntu (a brother of the parties) and consequently were not payable to plaintiff. The Chief gave judgment for plaintiff for 26 head of cattle and costs and defendant appealed against that judgment to the Native Commissioner. He reversed it and plaintiff appealed.

That appeal came before this Court at its last session at Vryheid and this Court ordered that the case be returned to the Native Commissioner for him to obtain the Chief's reasons for judgment which he had omitted to do in the first place and to give a fresh judgment.

The directions of this Court have been complied with and the appeal comes now before the Court for hearing and decision.

The Native Commissioner's judgment was a follows:—

"Appeal upheld and Chief's judgment altered to read for defendant with costs."

The Chief's reasons for judgment were:—

"1. It was proved that Ziphakanyiswa is the heir of his late father Bejane.

2. Bejane Zulu had many sons including plaintiff and the defendant.

3. Evidence showed that Jubelimpevu Zulu took two wives whose *lobolo* cattle came from the *indhlunkulu* and these cattle as came from the *indhlunkulu* are payable to the heir of Bejane.

4. Jubelimpevu admitted that *lobolo* for his two wives came from his father Bejane but denied that they were to be refunded."

and the grounds of appeal to this Court are:—

"1. That the judgment of the Native Commissioner, Nongoma, is against the weight of evidence and bad in law.

2. That the learned Native Commissioner erred in giving judgment against me being the rightful heir of the late Bejane Zulu."

At the outset it is difficult to follow why the Native Commissioner gave judgment for defendant when defendant in answer to the Court stated in evidence "I admit that Puzumona acted for plaintiff during his minority . . . The *umqoyiso* beast was killed . . . Puzumona paid the *umqoyiso* beast out of Bejane's estate. The *umqoyiso* beast should be returned by me. I admit I owe the estate 12 head of cattle." The heir to the estate was clearly the plaintiff and these twelve cattle admitted by defendant to be owing by him to the estate were the seven head advanced by the late Bejane personally and the four paid by Puzumona, who managed the estate, for the *lobolo* of defendant's first wife while the twelfth beast was the *Mqoliso* beast advanced from the estate by Puzumona.

Against this admission the Native Commissioner found proved that the eleven head mentioned were kraal property of the late Bejane and he says that it was not disputed that the *lobolo* paid for defendant's first wife was kraal property. He elaborates this by saying that no declaration in terms of section 92 (1) of the Code of Natal Native Law was made at the celebration of the union and therefore the advance was a gift. But he does not know from the evidence whether the Code of Native Law which he quotes was applicable to Zululand at the time because there is no evidence to show when the union took place. The late Bejane had twelve wives and there is no evidence to show that he divided his kraal into the usual sections and in fact it would seem clear that he did not. It is clear that the cattle belonged to the house to which plaintiff was heir as was stated in evidence by Puzumona and therefore they would be returnable to that house, as in fact defendant admitted, without any declaration having been made.

In regard to the fifteen head of cattle advanced for the second wife defendant admitted that the cattle came from a house other than his own but contended that they were the *lobolo* paid for Katazile the daughter of a wife affiliated to his mother's house. He produced a witness to prove that there was an heir in that house, Hlinzumuntu Zulu, to whom in his original plea in the Chief's Court he contended they were payable. Now the mother of this girl Katazile was not an ordinary wife according to defendant's evidence. He contended firstly that she was affiliated to his mother's house but failed entirely to prove this contention;

then he suggested she was taken as "loot" in war though no mention of the name of the battle in which she was captured was made. Then after contending that the first daughter of each house accrues to the *indhlunkulu* (in which respect he was probably quite right) he says that this girl Katazile who was her mother's eldest daughter did not so accrue. He further adds to the unacceptability of his contention that the cattle did not accrue to the *indhlunkulu* by declaring that his witness Hlinzumuntu received the *lobolo* paid for Katazile's younger sister, he being the heir in that house.

The Native Commissioner accepted that Katazile's mother was the customary wife of the late Bejane and held that Katazile's *lobolo* was house property but he failed to take into account that the *lobolo* of each first born daughter of the several wives of the late Bejane accrued to the *indhlunkulu* and so became the property of the *indhlunkulu* heir. The Native Commissioner in his reasons for judgment mentioned that he was of the opinion that the *indhlunkulu* property is the same as kraal property. This is not so. The *indhlunkulu* is merely the "great" house from which the other houses take their position. In his capacity as heir to the *indhlunkulu* the eldest son of the *indhlunkulu* inherits the "kraal property" but he also primarily inherits the house property of the *indhlunkulu* house just as any other "house" heir inherit the house property of his house. Put in simple language kraal property is property which is not house property.

In all the circumstances the judgment of the Native Commissioner is against the weight of evidence and is bad in law. The appeal therefore must succeed. It is accordingly ordered that the appeal be and it is hereby allowed with costs. The judgment of the Native Commissioner is set aside and for it is substituted "The appeal is dismissed with costs and the Chief's judgment is upheld."

For Appellant: In person.

For Respondent: In person.

NORTH-EASTERN NATIVE APPEAL COURT.

NHLEKO *v.* MAZIYA.

N.A.C. CASE No. 59 OF 1955.

VRYHEID: 5th October, 1955. Before Steenkamp, President, Ashton and Craig, Members of the Court.

PRACTICE AND PROCEDURE.

Misconception of remedy in applying for condonation of late noting of appeal—Rescission of default judgment correct application.

Held: That when a default judgment is granted application for its rescission in terms of paragraph 73 of the Rules of Native Commissioners' Courts should be made to the Court granting it before recourse is had to appeal to a higher Court.

Held further: That if the application for rescission is no longer available by reason of lapse of time the provisions of paragraph 84 (5) of the Rules of Native Commissioner's Court are still available.

Statutes, etc., referred to:

Section *fifty-six* (2) Native Commissioners' Courts Rules (Government Notice No. 2886 of 9.11.51.)

Section *eighty-four* (5) Native Commissioners' Courts Rules (Government Notice No. 2886 of 9.11.51.)

Appeal from the Court of the Native Commissioner, Nongoma.

Steenkamp (President), delivering the judgment of the Court:—

The appellant was the defendant in a case tried in the Chief's Court on the 18th February, 1954, and judgment was given against him. He thereupon appealed to the Court of the Native Commissioner but on the day, viz., the 18th May, 1954, the appeal was set down for hearing he was in default and on application of the respondent the appeal was dismissed with costs for want of prosecution.

An application, dated the 30th June, 1954, was made by appellant's attorney, supported by affidavit, for the re-instatement of the appeal. In the body of the application the words "for an extension of time for leave within which to apply for the re-instatement of the hearing of the appeal noted" were used.

Up to that stage the appellant's remedy was to apply for a rescission of the default judgment in terms of Rule 73 of the Native Commissioner's Court Rules, which had been granted by the Native Commissioner on the 18th May, 1954, and not for the re-instatement of the appeal from the Chief's Court.

Appellant therefore misconceived his remedy but on the day the application was set down for hearing both he and respondent were in default and the application was struck off the roll.

On the 8th December, 1954, appellant filed an application without affidavits, for an order re-instating the hearing of the appeal noted against the judgment of the Chief or alternatively for condonation of the late noting of the appeal noted against the judgment of the Chief.

The parties eventually on 9th August, 1955, with their respective attorneys appeared before the Native Commissioner.

Attorney for appellant then informed the Court that his application for condonation of the late noting of appeal is not supported by an affidavit and applied in terms of section 56 (2) of the Rules of the Native Commissioner's Court to call oral evidence in respect of the application.

It is difficult for this Court to follow the procedure followed in the Lower Court. The appeal from the Chief's Court to the Native Commissioner's Court was not noted late so why was it necessary to apply for condonation?

The Native Commissioner made the following note:—

> "After hearing both Mr. Kruger and Mr. Uys the application is refused."

The reasons for judgment is headed:—

> "Application for late noting of appeal."

He probably intended:—

> "Application for condonation of late noting of Appeal."

An appeal has been noted to this Court on the following grounds:—

"1. The Court erred in dismissing the defendant's application to re-instate his appeal against the Chief's judgment—

(*a*) in that the defendant was not in wilful default, at the hearing of his appeal, in any event it was for the respondent to prove wilful default on applicant's part;

(*b*) in that on the uncontradicted evidence of applicant, wilful default was not proved;

(*c*) in that defendant presented a *prima facie* case on the merits, and has no other course of placing his case before the Court.

2. No prejudice would be suffered by respondent by re-instatement and hearing of the appeal in view of the long delay on the part of respondent to bring his case."

Appellant's attorney has again confused the whole issue because ground 1 of the notice of appeal is opened with the words ". . . . application to re-instate his appeal against the Chief's judgment."

This is not the application heard by the Court. What the Court heard was in fact an application for the condonation of the late noting which as mentioned earlier was a misconceived remedy.

The Native Commissioner arrived at the right conclusion but the reasons for dismissing the application were not correct. Applicant's proper remedy was to apply for the rescission of the default judgment given on the 18th May, 1954, and once the time prescribed by the rules for such an application had elapsed he should have availed himself of the provisions of section 84 (5) of the Rules for Native Commissioner's Courts which are even now still open to him.

It is ordered that the appeal be and it is hereby dismissed with costs.

For Appellant: Mr. H. L. Myburgh (instructed by S. E. Henwood & Co.).

For Respondent: In absentia.

SOUTHERN NATIVE APPEAL COURT.

SOGA *v.* SOGA.

N.A.C. CASE No. 31 OF 1955.

UMTATA: 19th October, 1955. Before Balk, President. Warner and Brownlee, Members of the Court.

LAW OF DELICT.

Action for damages arising out of issue of interim interdict—Administration of deceased estate—Landed property not yet transferred to heirs—Rights of executor dative in regard to such property—Wife of deceased heir no usufructuary or heritable rights thereto.

Summary: The farm Tembeni (also known as Madliwa) in the Xalanga district formed an asset in the estate of the late Elima Soga. This property had not yet been transferred to the heirs. Ellen Soga, widow, of Roosevelt Soga, a deceased heir, placed one Tsoliwe, in charge of the farm during her absence in Johannesburg. The defendant, duly appointed executor dative in the estate of the late Elima Soga, issued an interim interdict against Tsoliwe restraining him from using or occupying the farm. Plaintiff, in his capacity as duly appointed representative in the estate of the late Roosevelt Soga, then sued defendant for damages which he contended he, in his said capacity, had sustained as a result of defendant's unlawful and wrongful occupation of the property during the period covered by the interim interdict.'

Held: The farm property fell under the administration of defendant in his capacity as executor dative in the estate of the late Elima Soga during the period covered by the interim interdict, and in view of this and the fact that his action in obtaining the interdict was motivated by a bona fide desire to protect the interests of the deceased heir, Roosevelt Soga, his occupation of the farm cannot be regarded as wrongful or unlawful.

Cases referred to:

Fischer *v.* Liquidators of the Union Bank 8, S.C. 46.

Liquidators of the Union Bank *v.* Watson's Executors, 8 S.C. 300.

Rubinow & Ano. *v.* Friedlander, N.O. & Others, 1953 (1) S.A. 6 (C.P.D.)

Greenberg & Others *v.* Estate Greenberg, 1955 (3), S.A. 361 (A.D.).

Statutes referred to:

Administration of Estates Act, No. 24 of 1913 [Section 68 (1)].

Appeal from the Court of the Native Commissioner, Cala.
Balk (President):—

This is an appeal from the judgment of a Native Commisioner's Court in an action in which the plaintiff (present appellant) sued the defendant (now respondent) for damages in the sum of £211. 19s. 6d., averring in his particulars of claim (Annexure "A" to the summons) that:—

"1. The parties hereto are Natives as defined by Act No. 38 of 1927.

2. Plaintiff sues in his capacity as a duly appointed representative in the estate of the Roosevelt Soga.

3. That at all times relevant to this action plaintiff in his above said capacity, was in possession of and had the running of the farm Tembeni (Bloemvale), situate in the Xalanga District, through the agency of Ellen Soga, the widow of the deceased Roosevelt Soga, who as such, according to Native Law and Custom, has a usufructuary interest therein.

4. In or about March, 1952, the said Ellen Soga went on a temporary visit to Johannesburg and entrusted the said Tembeni (Bloemvale) farm to the cultivation, care and management of one Mac Tsoliwe, with plaintiff's knowledge and approval of the then Native Commissioner at Cala.

5. On the 23rd June, 1953, at the instance of the defendant, the said Mac Tsoliwe was interdicted by an Order of the above Honourable Court from gathering or removing crops or other fruits from the Tembeni (Bloemvale, also known as Madliwa) farm or from any other portion of the immovable property of the above said estate or in any way dealing with such property.

6. As at the date of the service of the above said interdict, the said Mac Tsoliwe had harvested and gathered unbagged on the lands in the above farm certain quantity of the kaffir corn crop and placed same under the care and supervision of Ellen Soga's servant, Nkomponi, residing on the farm.

7. The defendant expelled the said Nkomponi from the Tembeni farm, and forcibly took from him the dipping cards and storeroom keys and took possession of all the cattle belonging to the above said estate.

8. On the 11th August, 1953, the above Honourable Court discharged the temporary interdict granted against the said Mac Tsoliwe.

9. Plaintiff refers to the facts set out above and pleads and states that as a result of the defendant's wrongful and unlawful occupation of the above said farm during the period 23rd June, 1953, to 11th August, 1953, plaintiff, in his aforesaid capacity, has suffered the damage set out in Annexure "B" hereto, for which defendant is in law liable and which plaintiff hereby claims from the defendant."

Annexure "B" referred to above reads as follows:—

"1. 1½ acres of wheat destroyed by stock value £5.
2. Damages sustained as a result of the failure to sow 1 bag of wheat. Plaintiff estimates this damage at £30.
3. An estimated 1½ bags of kaffir-corn destroyed by stock on the lands value £2. 2s.
4. £15 for the mealie-cobs and their stalks destroyed by stock on the lands.
5. £5 being value of beans removed from the lands.
6. 15s. being value of two buckets of beans taken from Nkomponi's wife.
7. £1 being value of wood cut down and removed from the farm.
8. £75 being grazing fees for stock allowed to roam on the farm.
9. £15 damage to fence.
10. 1,088 bundles of thatching grass removed or destroyed or its value £10. 12s. 6d.
11. 10s. damage to the door of certain hut on the farm.
12. £2 damages sustained as a result of destruction of an oxhide stored in the hut.
13. £35 being grazing fees paid for Nkomponi's stock as the result of your wrongful ejectment of him from the farm.
14. £8 travelling expenses of Ellen Soga from Johannesburg to Cala to attend the hearing of the action instituted by defendant.
15. £7 being cost of rebuilding certain stock kraal in its original position. This kraal was wrongfully removed from its proper place by defendant and/or his agents."

The defendant in his plea admitted paragraphs 1, 2 and 5 to 8, inclusive, of the particulars of claim (Annexure "A") stated that he had no knowledge of paragraphs 3 and 4 thereof and denied the remaining averments therein.

The Native Commissioner's judgment reads as follows:—

"For plaintiff for £20 on claim 13 with costs. For defendant on claims 6 and 14 with costs. Absolution from the instance with costs on the remaining claims, i.e. 1 to 5, 7 to 12 and 15."

The grounds of appeal are:—

"1. That the judgment is against the weight of evidence and is not supported thereby.
2. *Ad Item* 14: That the Native Commissioner erred in holding that Ellen's presence in the interdict proceedings between defendant and Mac Tsoliwe was unnecessary or that the estate is not liable for her travelling expenses to and from Johannesburg in connection with the interdict proceedings or that it is incompetent for plaintiff to claim these expenses from defendant as damages in the present action.
3. *Ad Item* 13: That the Court should have allowed the full amount of £35 which it found proved.

4. *Ad Items* 1, 3, 4, 8, 9, 11, and 12: That the Native Commissioner should have found as a proved fact that the damage occurred during the period that Mac Tsoliwe was wrongfully and unlawfully interdicted from entering the farm at the instance of the defendant and that the defendant is therefore in law liable for the damage.

5. *Ad Item* 2: The Court erred in holding that the wheat in question could just as well have been planted in August after defendant's occupation, as in June when Mac Tsoliwe was interdicted, and that therefore plaintiff had not proved any damage.

6. *Ad Item* 5: That in view of the Native Commissioner's finding "that certain damage was caused on the farm by stock" he should have found on a balance of probabilities that damage was done to the beans which were on the farm, and that the estimate of damages given by the plaintiff was reasonable in the circumstances.

7. *Ad Item* 7: That the Court erred by not assessing the damage sustained.

8. *Ad Item* 10: That the Court erred in holding that the plaintiff has not proved the damage claimed.

9. *Ad Item* 15: That in view of the evidence of the defendant's witness, James Mtshontshi, that he removed the stock kraal, the Court should have found that the plaintiff thereby suffered damages and as the amount of £7 claimed in the summons is not disputed by the defendant, the Court should have allowed this amount."

It emerges from the evidence that on the 23rd June, 1953, the defendant in his capacity as executor dative in the estate of the late Elima Soga, an appointment he held under letters of administration granted to him by the Master of the Supreme Court, Cape Town, applied for and obtained in the Native Commissioner's Court an interim interdict against Mac Tsoliwe in the following terms:—

> "Court orders that a rule *nisi* be and is hereby granted calling upon respondent to show cause, if any, on the 3rd July, 1953, at 10 o'clock in the forenoon or so soon thereafter as he may be heard why he shall not be interdicted from entering upon the farm, Madliwa, in the District of Xalanga, forming part of the estate of the late Elima Soga, pending the final liquidation of the said estate and from gathering or removing crops or other fruits therefrom or from any other portion of the movable property of the said estate or in any way dealing with such property and why he should not be ordered to pay the costs of this application.
>
> That this rule *nisi* serve as an interim interdict, restraining respondent from doing anything sought to be interdicted as above pending the hearing of this application."

The farm, Madliwa, then still formed part of the estate of the late Elima Soga, as it had not yet been transferred to the heirs of whom the late Roosevelt Soga was one. The latter's widow, Ellen Soga, had neither a usufractuary right, in the accepted sense of the term, to this farm nor a heritable right thereto; and whilst the defendant may have allowed her to use the farm (in Native Law she has a right to be supported from the estate of her deceased husband) he did not directly or indirectly authorise or agree to Mac Tsoliwe's dealing with the farm. The defendant applied for the interim interdict after it had come to his knowledge that Mac Tsoliwe had removed certain property from the farm during the absence therefrom of Ellen Soga whose whereabouts was then unknown to the defendant.

In these circumstances it is manifest that the defendant, in his capacity as executor dative in the estate of the late Elima Soga, was still responsible for the farm at the time he obtained the interim interdict against Mac Tsoliwe and that he took this action bona fide in pursuance of his duty to protect the interests of the deceased heir, Roosevelt Soga. It follows that the farm property fell under the administration of the defendant in his said capacity during the period covered by the interim interdict, i.e. from the 23rd June, 1953 to 11th August, 1953, so that he had the right to occupy it during this period, and such occupation cannot be regarded either as wrongful or unlawful, see section *sixty-eight* (1) of the Administration of Estates Act, 1913, Fischer *v.* Liquidators of the Union Bank, 8, S.C. 46, at pages 52 to 54, Liquidators of the Union Bank *v.* Watson's Executors, 8, S.C. 300, at page 306, Rubinow and Another *v.* Friedlander, N.O. & Others, 1953 (1), S.A. 6 (C.P.D.), at page 15 and Greenberg and Others *v.* Estate Greenberg, 1955 (3), S.A. 361 (A.D.), at pages 364 to 366.

Accordingly the plaintiff cannot succeed in his action for damages based, as it is, on the wrongful and unlawful occupation of the farm by the defendant during the period mentioned above. Here it should be mentioned that it is unnecessary to consider any question of negligence or *mala fides* on the part of the defendant in his administration of the estate as this does not form the basis of the claim. Whilst, therefore, the appeal fails, the Native Commissioner's judgment does not, in the absence of a cross-appeal by the defendant, fall to be disturbed.

In the result I am of opinion that the appeal should be dismissed with costs.

Warner (Permanent Member): I concur.

Brownlee (Member): I concur.

For Appellant: Mr. Tsotsi, Lady Frere.

For Respondent: Mr. Vabaza, Libode.

SOUTHERN NATIVE APPEAL COURT.

MEMANI *v.* WORASI.

N.A.C. CASE No. 45 OF 1955.

UMTATA: 19th October, 1955. Before Balk, President. Warner and Brownlee, Members of the Court.

LAW OF PROCEDURE.

Interpleader action—Rebuttal of presumption of ownership—Onus—Juridicial possession not affected by fictitious transaction (registration in dipping records).

Summary: Ten head of cattle, which were attached by the Messenger of the Court at claimant's kraal, were actually in the judgment debtor's possession and registered in the latter's name in the dipping records up to the time that the relative warrant of execution was issued, and were only tranferred to the claimant shortly thereafter and not long before their attachment.

Held: (1) That the onus of rebutting the presumption of ownership arising from the claimant's possession of the stock at the time of the attachment rested on the judgment creditor.

(2) That as the transaction whereby the claimant acquired the cattle was a fictitious one the cattle were actually still in the juridicial possession of the judgment debtor when attached.

Cases referred to:

Hulumbe *v.* Jussob, 1927, T.P.D. 1008.

Gleneagles Farm Dairy *v.* Schoombee, 1949 (1), S.A. 830 (A.D.).

Appeal from the Court of the Native Commissioner, Umtata.
Balk (President):—

This is an appeal from the judgment of a Native Commissioner's Court in an interpleader action, declaring certain ten head of cattle to be executable, with costs.

The appeal is brought by the claimant on the following grounds:—

"1. The Additional Native Commissioner erred in finding that the defendant, upon whom the onus rested, had discharged the onus of proving that the cattle attached were the property of the judgment debtor.

2. That being so, the judgment should have been one for plaintiff and for the cattle to be declared non-executable, with costs."

It is common cause that the ten head of cattle were attached by the Messenger of the Court at the kraal of the claimant so that the onus of rebutting the presumption of ownership arising from the claimant's possession of the stock at the time of the attachment, rested on the judgment creditor, see Hulumbe *v.* Jussob, 1927, T.P.D. 1008 and Gleneagles Farm Dairy *v.* Schoombee, 1949 (1) S.A. 830 (A.D.), second paragraph on page 836, from which it seems to me that the inference can properly be drawn that the ordinary rule as regards the onus of proof in cases of the nature in question obtains.

The circumstances in the instant case, like those in the *Gleneagles* case, are peculiar in that here, as is manifest from the uncontroverted evidence for the judgment creditor, the cattle were in the judgment debtor's possession and registered in the latter's name in the dipping records up to the time that the relative warrant of execution was issued and they were only transferred to the claimant shortly thereafter and not long before their attachment. It follows, that in the instant case, as in the *Gleneagles* case, the presumption of ownership arising from the claimant's possession of the cattle on their attachment cannot be regarded as decisive for, as stated at page 836 of the report of the lastmentioned case, if the transaction whereby the claimant acquired the cattle was a fictitious one, then they were actually still in the juridicial possession of the judgment debtor when attached.

In the instant case the claimant's case was closed without any evidence having been led for him and, apart from any question of drawing a conclusion adverse to him on that account, there are factors militating against the success of his case; for, according to the evidence of the judgment creditor's witness, Amos Cenge, the dipping foreman of the area concerned, it appears that, with the possible exception of one beast, the judgment creditor obtained the ten head of cattle from persons other than the claimant; and, according to the uncontroverted testimony of the judgment creditor, the claimant is the elder brother of the judgment debtor. These factors make it improbable that the cattle were the property of the claimant since ordinarily it is not in keeping with Native Custom for a younger brother to hold at his kraal his elder brother's livestock, particularly where as here, the kraals adjoin and no exceptional circumstances appear to be present. It follows that the judgment creditor has discharged the onus of proof resting on him and that therefore the appeal falls to be dismissed with costs.

Warner (Permanent Member): I concur.

Brownlee (Member): I concur.

For Appellant: Mr. White, Umtata.

For Respondent: Mr. Muggleston, Umtata.

NORTH-EASTERN NATIVE APPEAL COURT.

MNGADI *v.* NGCAMU.

N.A.C. CASE No. 51 OF 1955.

PIETERMARITZBURG: 20th October, 1955. Before Steenkamp, President, Ashton and Bridle, Members of the Court.

(a) PRACTICE AND PROCEDURE.

Failure to serve Notice of Hearing of Appeal vide *Rule 6, Native Appeal Court Rules.*

(b) ZULU LAW AND CUSTOM.

Section eighty-seven *of the Natal Code of Native Law Proclamation No.* 168 *of* 1932.

Summary: Plaintiff sued defendant for the balance of *lobolo* due on his sister. Plaintiff was an Induna as was his father before him but his father's appointment was terminated before his death. Plaintiff as heir to his father married off his sister to defendant, the agreed *lobolo* being fifteen head of cattle. After paying ten head defendant contended that as the girl's father was not an Induna when he died and when the customary union took place, only ten head were payable in terms of section *eighty-seven* (1) of the Natal Code of Native Law Proclamation No. 168 of 1932. It was contended for plaintiff that as he was the guardian of his sister and an Induna he was entitled to fifteen head as *lobolo* for her. The point for decision was whether plaintiff was entitled to fifteen head as *lobolo* for the girl by virtue of her parentage or by virtue of plaintiff's position as an Induna.

Held: (*a*) Notice of appeal from a Native Commissioner's Court must be properly served on the respondent in terms of Rule No. 6 of the Native Appeal Court Rules.

Held: (*b*) (1) That once the parentage of a girl has raised her *lobolo* value she does not loose that value no matter who is the rightful recipient and no matter what his rank.

Held: (2) That a guardian who is entitled to a girl's *lobolo* and who is not the father cannot claim a higher number by virtue of his own rank or position.

Held: (3) The *lobolo* claimable for a girl is determined according to her parentage.

Cases referred to:

Ketane *v.* Msundulo, 1953, N.A.C. 259 (S.)
Cele *v.* Cele, 1953, N.A.C. 150 (N.E.)
Qina *v.* Qina, 1939, N.A.C. (C.O.) 41.
Mkize *v.* Mtimkulu, 1944, N.A.C. (T. & N.) 14.
Mkize *v.* Mdunge, 1 N.A.C. 283 (N.E.), 1951.
Rulemende *v.* Majwabu, N.H.C. 1903, 27.
Bok Street Bottle Store *v.* Kahn, 1948 (1) S.A. 1068 (W.L.D.).

Statutes, etc., referred to:

Rule 6, Native Appeal Court Rules (Government Notice No. 2887 of 9.11.51.)

Section *eighty-seven*, Natal Code of Native Law (Proclamation No. 168 of 1932).

Appeal from the Court of the Native Commissioner, Richmond.

Steenkamp (President): Dissentiente:—

Respondent has filed a notice of objection to the hearing of the appeal on the ground that appellant failed to serve a notice of appeal upon the respondent or his attorney in terms of the Native Appeal Court Rules.

There is not filed of record an affidavit to the effect that respondent had not received a notice of appeal but counsel has argued that once the objection is raised the onus is on the appellant to prove that the notice of appeal had been served in terms of Rule 6 of the Native Appeal Court Rules.

In persuing the notice of appeal we find that it is addressed to the clerk of the court and to the respondent personally notwithstanding that he was legally represented in the Court below.

Counsel for appellant was unable to produce any evidence that the notice of appeal had been served as indicated in the various sub-sections of section 6 and if there had not been any appearance for respondent this Court would have taken a different view of the matter and attorneys would be well advised to comply strictly with the provisions laid down in the rules.

In the case of Ketana *v.* Msundulo, 1953, N.A.C. 259 (S) the Court held that as a written acknowledgment of the receipt of a copy of the notice of appeal was not obtained from respondent's attorney in terms of the rules of the Native Appeal Court, the service of the not ce of appeal was fatally defective. There is also the case of Cele *v.* Cele, 1953, N.A.C. 150 (N.E.) in which the appeal was struck off the Roll. It was held in that case that it is the duty of the appellant to see that a notice of appeal is properly served on the respondent.

In referring to the case of Qina *v.* Qina, 1939, N.A.C. (C.O.) 41, it is found that after examining various authorities the Court came to the conclusion that the guiding factor is the question of substantial prejudice to either side.

In the present appeal the respondent is represented by counsel. A notice setting down the hearing of the appeal for the 18th October, 1955, was received by respondent's attorney on the 6th September, 1955. He had ample time to prepare for the defence of the judgment he had obtained in the Native Commissioner's Court and in fact has engaged counsel who was fully prepared to argue and therefore he has not suffered any prejudice at all.

In the circumstances the objection is dismissed and counsel for appellant was called upon to prosecute the appeal.

I have read the judgments of my brothers Ashton and Bridle and while I admit that their reasoning is good, yet I feel that the decisions in the case of Mkize *v.* Mtimkulu, 1944, N.A.C. (T. & N.) 14, and in the case of Mkize *v.* Mdunge, 1. N.A.C. 283 (N.E.) 1951, must prevail and I regret I cannot agree that the appeal should be dismissed with costs.

In the former case, it is true, the only question the Court dealt with was whether or not the Induna had been lawfully removed from office, but the indication therein is that it was accepted that if the father had been lawfully removed from office, he was not entitled to a higher *lobolo*.

In the latter case the Induna's appointment had been terminated and it was held that he was only entitled to the *lobolo* applicable to a commoner's daughter.

The construction of section *eighty-seven* (1) is fraught with difficulties and anomalies concerning the number of *lobolo* a guardian is entitled to for his ward.

On the plain grammatical construction of the first portion of this section it is clear that the *lobolo* for a ward is determined according to the rank or position of her guardian, yet if we go according to the caption in that section the number of catlte claimable is only in respect of a woman who is the daughter of the person entitled to the *lobolo*. There is no mention made what number of cattle a guardian other than the natural father, may claim for a ward.

Let us assume that the word "daughter" mentioned in the caption shall mean to include "ward" then we will find this anomaly that a Chief who has become the guardian of his brother's daughter may claim an unlimited number of cattle as against the twenty which the father, if still alive, could have claimed. On the other hand, if "daughter" means only the natural daughter of one of those persons mentioned, then no scale is prescribed as to the number of cattle the guardian who is of the same lower or higher rank than what her father was, may claim.

One more example will still further prove the absurdity of the wording of the section.

A male person becomes the guardian of a number of girls belonging to the various houses of the deceased father who was a commoner but the guardian is an Induna, may he, while only an interim guardian, claim the higher *lobolo* to be handed over eventually to the heir who is also only a commoner.

In view of the wording of this section which I have attempted to prove is meaningless and which creates such a doubt as to the intention of the legislature concerning the number of cattle payable to a guardian, sub-section 2 must be invoked to arrive at a decision.

This sub-section reads:—

> "In any case of doubt the *lobolo* must not exceed ten head of cattle or their equivalent."

Even this sub-section is full of anomalies as no mention is made concerning a doubt as to whether the father was a Chief's brother or an Induna. He might be either but certainly not of lower rank. Yet he will only be entitled to 10 head of cattle.

I will concede that if the girl's father had died an Induna his heir would have been entitled to 15 head of cattle.

In my opinion the appeal should be allowed but the majority of the Court is against me and it is consequently ordered that the appeal be and it is hereby dismissed with costs.

The application for costs on the higher scale is refused.

Ashton (Permanent Member):

I agree that the objection against the hearing of the appeal and the application for costs on the higher scale should be dealt with in terms of the judgment of the learned President, but I find myself regrettably unable to agree with him in his view that the appeal be allowed.

I now proceed with the case brought on appeal from the Court of the Native Commissioner, Richmond. Plaintiff sued defendant in a Chief's Court for the balance of *lobolo* due on his sister. Defendant admitted owing five head but the Chief gave judgment for six. On an appeal by the defendant to the Native Commissioner's Court the judgment was altered to one for five head and defendant now appeals to this Court on the following grounds:—

"1. The judgment is bad in law.

2. The agreement that defendant should pay 15 head of *lobolo* is illegal as only 10 head are claimable on the ground that plaintiff's late father resigned as an Induna before his death.

3. That the present plaintiff, although an Induna, is not entitled to claim 15 head of *lobolo* cattle.

4. That there is no evidence before the Court that plaintiff is the general heir of his late father, or that any other reason exists why plaintiff should be entitled to claim the *lobolo* cattle in question."

The facts in the case are not disputed. Briefly they are that plaintiff's father was an Induna and before his death he resigned his office; after his father's death plaintiff gave his sister's hand in marriage to defendant, they having first agreed that the *lobolo* should be fifteen head of cattle. Part of the *lobolo* was paid and it was agreed that the balance was five head. But now the defendant seeks to avoid his indebtedness by contending that as the girl's father was not an Induna when he died the *lobolo* fell to be limited to ten head under the provisions of section No. 87 of the Natal Native Code and as ten head had been paid no more were due.

In regard to the point that there was no evidence before the Native Commissioner to the effect that plaintiff was not the general heir of his late father or that any other reason exists why plaintiff should be entitled to claim the *lobolo* of his sister it is only necessary to point out that defendant admitted owing five head of cattle to plaintiff and it was quite unnecessary to prove heirship and particularly general heirship to the girl's father. In any case the plaintiff's right to sue was not challenged in the Lower Court and that point cannot be taken for the first time on appeal. Counsel for appellant in his argument before this Court said he was not pursuing ground 4 of the notice of appeal and confined his arguments to grounds 1, 2 and 3 which he consolidated into one.

It was not disputed that plaintiff succeeded his father and was an Induna when he married his sister off and the crisp point for decision is whether the plaintiff was entitled to claim fifteen head as *lobolo* for the girl by virtue of her parentage or by virtue of his (the plaintiff's) position as an Induna.

It is gathered from his reasons for judgment that the Native Commissioner decided that because plaintiff was an Induna he was entitled as his sister's guardian to demand fifteen head of cattle as *lobolo* in terms of section 87 of the Natal Code of Native Law.

That section deals with the *lobolo* demandable for a woman and *inter alia* lays down that the *lobolo* for a girl or woman who is a ward is determined by agreement according to the rank or position of her father or guardian but shall not exceed fifteen head for a woman who is the daughter of a headman, Chief's deputy or official witness. It should here be stated that the term "Induna" is synonymous with "Chief's deputy".

Although the first part of sub-section (1) of section 87 mentioned above refers to the *lobolo* for a woman who is the ward of a guardian and although it states that the *lobolo* for such a woman is determined according to the rank or position of the father or guardian the second part of the sub-section deals only with the *lobolo* of a woman who is a daughter of the persons it mentions—there is absolutely no mention of female wards of guardians. This omission renders the literal interpretation of the whole sub-section most difficult and it is obvious that the use of the words "or guardian" after the word "father" was unintentional or that it was used synonymously for father, the two words being so frequently used together in Native Law.

To interpret the sub-section as the Native Commissioner did to mean that a guardian who was an Induna could claim fifteen head of cattle for the daughter of a commoner would not only be contrary to practice and what has become custom in Natal but it would be absurd as a consideration of the consequences of such an interpretation would show.

It is clear from the judgment in the case of Rulumende *v.* Majwabu N.H.C. 1903, 27, that the *lobolo* which may be demanded for a woman about to be married depended upon her parentage and not upon the rank or position of the recipient of her *lobolo.* It is true that that decision was based on the Natal Code of 1891 which was replaced by the Code of 1932, but where the latter was so worded as not to be clear in its alteration of the previous provisions it falls rightly within the province of this Court to say what the intention of the later provisions were and to decide that the intention was not to alter the previous position.

It is therefore my view that the *lobolo* which may be demanded for a girl is determined solely by the rank or position of her father.

The next point to be considered is whether the cessation of the father's rank or position which gave his daughters a higher *lobolo* value decreases that higher value.

The point has previously been before this Court. In the case of Mkize *v.* Mdunge, 1, N.A.C. 283, it was held "that the removal of an Induna by the Government from one Chief to another, under whom he does not act as Induna, is equivalent to a direction by the Native Commissioner for the termination of such appointment and that if he thereafter gives his daughter in marriage, he is only entitled to the *lobolo* applicable to a commoner's daughters".

But the Court in that case did not give any reasons for stating that as the plaintiff was not an Induna at the time he gave his daughter in marriage he was entitled to demand only ten head of cattle as her *lobolo* and it would seem that it addressed its mind more to the question as to whether the removal of the Induna from one Chief to another terminated his appointment as an Induna.

However the Court may have had in mind the decision of the Court in Mkize *v.* Mtimkulu, 1944, N.A.C. (T & N), 14, wherein it was decided that the respondent was legally appointed an Induna, his appointment had not been terminated and consequently he was entitled to fifteen head of cattle as *lobolo* for his daughter. From this it is possible that the Court in the later case assumed that the decision was authority for holding that if the respondent's appointment had been terminated he would have been entitled to ten head only as *lobolo* for his daughter.

With respect such an assumption was not only dangerous but in my view wrong and it is apparent that the Court in both instances propounded the view that the termination of the appointment of an Induna automatically lowered the *lobolo* value of his unmarried daughters without giving any reasons for such a view and it would seem that the point was not fully canvassed in either of the cases.

If it had been the intention of the framers of the Code that such a result would follow such an event it is reasonable to assume that they would have inserted a provision to that effect but they did not.

Such being the case, I think it is clearly established that once the parentage of a girl has raised her *lobolo* value she does not lose that value no matter who is the rightful recipient and no matter what his rank. In the Rulumende *v.* Majwabu case quoted above Campbell J. P. said:—

> "The Magistrate has concluded that the rank of the person entitled to the *lobolo* determines its amount. The plain terms of the Code do not support this view, but enact that birth without regard to where it happens, is the basis; *a provision quite in consonance with Native feeling, rank following upon descent being held in estimation among them. Guardianship may and does change but parentage does not.*"

The italics are mine and with respect I feel that if this Court had had this decision before it when it considered the two cases quoted above it would have reached a different conclusion.

In the outcome, it is my view that plaintiff was entitled to fifteen head of cattle for his sister by virtue of the fact that her father was an Induna and that judgment in plaintiff's favour for five head of cattle and costs was correct.

The appeal should therefore be dismissed with costs.

Bridle (Member):

I agree with the learned President that the objection be dismissed, and I also agree that the application for costs on the higher scale should be refused. I regret, however, I am unable to agree with him that the appeal should be allowed.

The facts in this appeal are not in dispute and there are only two points that arise. The first is whether, upon the girl's father ceasing, for any reason whatever, to hold a rank or position by virtue of which a higher number than 10 head of cattle as *lobolo* is claimable, the person to whom the *lobolo* is payable can no longer receive such greater number. The second is whether the rank or position of a woman's guardian also determines the *lobolo* payable for her.

To deal with the second point first, section 87 (1) of the Code reads: "the *lobolo* for a girl or woman who is a ward is determined according to the rank or position of her father or guardian and is determined by agreement, but shall not be in excess of the scale prescribed in the following table:—

For a woman who is the daughter of—	*Maximum number of cattle as* lobolo.
(*a*) a Chief	No limit.
(*b*) the son, brother or uncle of a Chief	15 head.
(*c*) a headman, Chief's deputy or official witness	15 head.
(*d*) any other Native	10 head.

It is clear from this section that the *lobolo* for a girl is determined according to the rank or position of her father, but on the ordinary grammatical construction of the first portion thereof, it is just as clearly stated that the *lobolo* for a woman is determined according to the rank or position of her guardian. According to the caption to the scale of *lobolo* prescribed in this section, however, mention is made only of a woman who is the daughter of a Chief, etc.

In order, therefore, to make sense of the section it seems to me that the words "or guardian" following the word "daughter" occurring therein, must be construed as synonymous with "father". In the case of Bok Street Bottle Store *v.* Kahn, 1948 (1), S.A. 1068 (W.L.D.), Price, J, says, at page 1074 of the report: "Of course there are cases where the absurdity or injustice caused by giving the words their literal meaning is so glaring that it could not have been the intention of the legislature that such a result should be brought about, and then the Courts are forced to adopt some other meaning in order to avoid an absurdity or injustice that Parliament could not have intended". This, as a moment's reflection will indicate, is the case here. If parentage were not to determine the *lobolo* claimable, then the way is wide open to all sorts of abuses and injustices. Take for example the case of a commoner dying and leaving a son and several daughters. An Induna becomes the temporary guardian. Is it equitable that if, during the minority of the heir, he marries off some of the daughters, he should be able to claim fifteen head of cattle for them while the son, a commoner, when he

reaches his majority, can only claim 10 head of cattle for those of the daughters he gives in marriage. There are various other examples that could be quoted but this one will, I think, suffice to show the danger inherent in construing the word "guardian" in this section in its literal sense i.e. as distinct from the relationship between father and child.

A much more logical and firm basis for the calculation of *lobolo* exists when parentage alone is the determining factor, and all dictates of common sense and sound policy lead one to the conclusion that this indeed was the intention of the framers of the Code.

In regard to the first point referred to it seems to me to be obvious that, if a girl's *lobolo* value is determined according to the rank or position of her father, she retains that higher status whether or not her father subsequently loses his rank or position. It is clear, as the learned President in his judgment agrees, that if the girl's father was still an Induna on his death then her guardian was entitled to claim 15 head of cattle for her, and it seems to me to be an equally unassailable proposition that if before death her father ceased to hold office as an Induna, her *lobolo* value by virtue of her father's position remains unaffected.

I am re-inforced in this view by the judgment in the case of Rulumende *v.* Majwabu, N.H.C., 1903, 27, in which the following passage occurs (at page 28): "The Magistrate has considered that the rank of the person entitled to the *lobolo* determines its amount. The plain terms of the Code do not support this view, but enact that birth without regard to where it happens, is the basis; a provision quite in consonance with Native feeling, rank following upon descent being held in estimation among them. Guardianship may and does change but parentage does not."

In the circumstances I agree with my brother Ashton that the appeal should be dismissed with costs.

I also agree with the conclusions reached by him regarding the fourth ground of appeal.

For Appellant: Adv. van Heerden (instructed by C. C. C. Raulstone & Co.).

For Respondent: Mr. E. Franklin (instructed by C. C. Muller).

CENTRAL NATIVE APPEAL COURT.

NGAKANE *v.* MAALAPHI.

N.A.C. CASE No. 22 OF 1955.

JOHANNESBURG: 24th October, 1955. Before Wronsky, President, Menge and Smithers, Members of the Court.

DISSOLUTION OF CUSTOMARY UNION.

Co-joinder of female partner—Claim included for custody of children—Order for delivery of children, whether competent.

Summary: Plaintiff (now appellant) alleged that his wife by customary union had deserted and he sued defendant for her return or the repayment of *lobolo;* also for custody of the children of the union.

The Native Commisisoner held that the summons was faulty for misjoinder of the woman. On appeal—

Held: That the female partner of a customary union must be joined as co-defendant in a matrimonial action by the male partner in which he claims the custody of the children of the union, whether or not she is in possession of the children.

Held further: That for purposes of the recovery of the *lobolo* the female partner need not be joined.

Semble: An order for the "delivery" of a child is not competent.

Cases referred to:

James Tshabalala *v.* Gracy and David Sikere, 1943, N.A.C. (C. & O.) 60.

Hans Tyobeka *v.* Wilson Madlewa, 1943, N.A.C. (T. & N.) 60.

George Mashapo and Myeti Mashapo *v.* Joel Sisane, 1945, N.A.C. (T. & N.) 57.

Mpantsha *v.* Ngolonkulu and Another, 1952 (1) N.A.C. 40.

Hendrik Matundaba *v.* Alfred Morenwa, 1951, N.A.C. (N-E) 326.

Mbenyane *v.* Hlatshwayo, 1953 (4) N.A.C. 284.

Ex parte Minister of Native Affairs in *re* Yako *v.* Beyi, 1948 (1) S.A. 391 (A.D.).

Mansell *v.* Mansell, 1953 (3) S.A. 716.

Appeal from the Court of the Native Commissioner, Johannesburg.

Menge, Permanent Member (delivering judgment of the Court):—

Plaintiff's summons alleges that he entered into a Native customary union with defendant's ward, Lizzie, and that the latter deserted him taking the two minor children of the marriage with her, as also certain household articles, but it is not stated whose property these are. He claimed from defendant—

(*a*) an order for the return of his wife, failing which a refund of *lobolo* less deductions;

(*b*) delivery and custody of the minor children;

(*c*) return of the articles or payment of their value.

The defendant after entering appearance was in default but the Native Commissioner heard evidence in support of the claims and thereupon made the following order:—

> "Court rules that the mother of the children should be joined as second defendant and that a copy of the summons with an amended return date be served on her".

The Native Commissioner relied, according to his reasons on an *obiter dictum* in the case of Nkosi *v.* Dhlamini heard in this Court on 15th May, 1955, and not yet reported.

Against this order the plaintiff now appeals.

It will be convenient to deal first with claim (*b*) and then with claims (*a*) and (*c*).

The law on the question whether in a suit for the restoration of dowry the female partner must be joined has been much discussed in the Native Appeal Courts. Up to 1943 the practice was not to join the woman (see James Tshabalala *v.* Gracy and David Sikere, 1943, N.A.C. (C. & O.) 60, which Seymour cites at page 113 of his recent book in Native Law). In that year, however, the procedure was altered in the Transvaal [see Hans Tyobeka *v.* Wilson Madhlewa, 1943, N.A.C. (T. & N.) 60], when it was decided that the woman must be joined if dissolution is claimed. However, in 1945 in the case of George Mashapo and Myeti Mashapo *v.* Joel Sisane, 1945, N.A.C. (T. & N.) 57, the Transvaal and Natal Native Appeal Court reversed this decision and restored the rule that the wife may not be joined. That is apparently still the rule in the Cape even if custody of children is claimed [see Mpantsha *v.* Ngolonkulu and Another, 1952 (1), N.A.C. 40].

All these cases, and many others which have been consulted from 1943 to 1951, deal purely with the dissolution aspect—whether it is necessary to cite the woman if dissolution of the customary union is claimed. In none of them was any consideration given to the question whether she should be joined by virtue of the fact that she is the mother of children who are claimed even though there were usually claims for custody of children. It seems to have been assumed throughout that this fact makes no difference; so much so that in *Hans Tyobeka's* case the order or custody was confirmed in spite of the fact that the order for the return of the woman was set aside because of the non-joinder.

However, in the case of Hendrik Matundaba *v.* Alfred Morenwa, 1951, N.A.C. (N-E), 326, the North-Eastern Native Appeal Court ruled that the wife must be joined if custody of her children is claimed and she is in possession of the children. This was followed in the same Court in Mbenyane *v.* Hlatshwayo, 1953 (4), N.A.C. 284.

No reasons are given for the two last-named decisions. The 1949 case of Mguli *v.* Ngubo cited in support of the former is hardly in point as that case dealt with children of a civil marriage. It is possible that the failure to adduce proper reasons in *Matundaba's* and *Mbenyane's* cases led the North-Eastern Court to restrict its decision to those instances where the woman is actually in possession of the children.

There are, however, a number of good reasons why the wife should be joined as co-defendant when the custody of children is claimed whether or not the woman is in possession. There may be some defence which only she could raise, e.g. that the customary union was later followed by a civil ceremony in which case the Native Commissioner's Court would have no jurisdiction. Then again, a mere award of custody as against the woman's guardian will not avail the plaintiff if his wife has control or at any time gets control of the children and refuses to part with them. Thirdly, the Court, as upper guardian of all minors will be quided in matters of custody by what is in the children's interests, and one would expect that the Court would, for that reason, wish to hear the views of the mother before ordering a change of custody. But the main reason is, of course, that Native Custom does not enter into the matter at all (see *Ex parte* Minister of Native Affairs in *re* Yako *v.* Beyi, 1948 (1) S.A. 391 (A.D.)]. section *eleven* (3) of the Native Administration Act, 1927, provides that the capacity of a Native to defend his rights in any Court of Law shall be determined as if he were a European unless "the existence or extent of any right held or alleged to be held by a Native or of any obligation resting or alleged to be resting upon a Native depends upon or is governed by any Native Law". Now, the right of a woman not married in Civil Law to the custody of her child does not depend on and is not governed by Native Custom for the purposes of section *eleven* (3) (*a*) of the Act. Such a woman need not rely for her defence on Native Custom at all since her rights are fully recognised by the Common Law. Her capacity to defend—as opposed to and irrespective of the legality or merits of her defence—has to be determined as if she were a European and consequently she must be joined in the action.

For these reasons I consider that this Court should not only follow the procedure of the North-Eastern Native Appeal Court, but should go one step further and insist upon joinder of the female partner of a customary union where custody of her children is claimed by her male partner, whether or not she is in possession of the children.

It follows that the Native Commissioner's order is correct in regard to claim (*b*). There is another aspect as regards this claim which calls for comment. The summons asks not only for the custody of the children, but also for their delivery. It does not

seem to me that the Native Commissioner could grant such an order because I do not see how it could be enforced, and a Court will not, even by consent, make an order which cannot legally and practically be enforced [see Mansell *v.* Mansell, 1953 (3), S.A. 716, at page 720]. However, as a decision on this question is not strictly necessary for the purposes of this case, there is no need to deal with it further.

As to claims (*a*) and (*c*), the Native Commissioner should have disposed of these in terms of the application for default judgment, for these do not require joinder of the female partner of the customary union. Claim (*c*) does not require it, because the claim in any case does not set out a cause of action. This was conceded by Mr. Tambo. Claim (*a*) does not require joinder in view of the long line of decisions of the Native Appeal Courts already referred to. We see no reason whatsoever to quarrel with these decisions, in so far as they affect claims for the refund of dowry.

In the result the appellant succeeds in only one of three claims, viz. claim (*a*) and there is no reason to suppose that he would not have succeeded therein if he had complied with the Native Commissioner's order. The appeal is upheld in regard to the first claim only. The matter is referred back for disposal of this claim in terms of the request for default judgment. The Native Commissioner's order is confirmed as regards the second claim. As regards the third claim it is ordered that judgment be refused. There is no order as to costs of appeal.

For Appellant: Mr. O. R. Tambo.

For Respondent: Mr. J. W. van Tonder.

NORTH-EASTERN NATIVE APPEAL COURT.

MBAMBO *v.* CHIEF DHLOMO.

N.A.C. CASE No. 62 OF 1955.

ESHOWE: 26th October, 1955. Before Steenkamp, President, Ashton and Nel, Members of the Court.

(a) PRACTICE AND PROCEDURE.

Value of animals attached in pursuance of a judgment of Court—Payment into Court.

(b) POWERS OF CHIEFS IN NATAL PROVINCE.

Chief cannot fine person in his absence.

Summary: Plaintiff sued the defendant, his Chief, for the return of five sheep which he contended were wrongly taken from him. Defendant pleaded that he imposed fines upon the plaintiff amounting to £9 and that the sheep were attached in execution of the judgment, the fines not having been paid. Defendant valued the sheep at £2 each and claimed that 10s. was the costs of attachment and he tendered repayment of 10s. the balance from the £10.

Held: (1) That it is correct practice in a Chief's Court in Zululand when an animal is attached for a monetary fine to sell the animal for a fair price, take sufficient to satisfy the judgment from the proceeds and return the balance.

Held: (2) That a person may not be fined by a Chief in his absence.

Held: (3) That tender of payment by a defendant to plaintiff must be implemented by payment of the amount into Court in terms of section *forty-five* (6) of the Rules for Native Commissioners' Courts.

Held: (4) That the Court does not readily remit a case back to a Native Commissioner for further action and in a suitable case will make the best of what is before it.

Statutes, etc., referred to:

Section *forty-five* (6) Native Commissioner's Courts' Rules (G.N. 2886 of 9.11.51.)

Appeal from the Court of the Native Commissioner, Nkandhla.

Steenkamp (President), delivering the judgment of the Court:—

In the Native Commissioner's Court the plaintiff (now appellant) sued the defendant (now respondent) a Chief in the district of Nkandhla for the return of five sheep which plaintiff avers defendant wrongfully caused to be removed from his possession.

Defendant's plea which is endorsed on the back of the summons by the Clerk of the Court reads as follows:—

> "Avers that sheep were properly attached as plaintiff was fined £5 and in default of the payment of the £5 the sheep were attached."

The case was duly set down for hearing but on that day the Native Commissioner took fresh pleadings from both the plaintiff and the defendant.

The plaintiff's claim was substantially the same as endorsed on his summons with the exception that plaintiff now demands the return of the five sheep or their value £7 each and costs of suit.

Defendant's plea, however, differs somewhat from the one he originally filed. He now avers that the fines imposed on the plaintiff were in respect of two cases, viz., numbered 267/1954 tried on 24th September, 1954 and 334/54 tried on 7th December, 1954, and that the fines totalled £9; that he valued the sheep at £2 each and tenders to plaintiff the sum of £1 due to him less 10s. costs of tribal constable. He further alleges in the amended plea that he had sent for defendant (meaning plaintiff) to pay him the 10s. due but he failed to appear.

Plaintiff's replication is a denial that he had ever been the accused at the Court of the Chief or that he had ever been summoned to appear at such Court. He declines to accept the tender of 10s. and claims £35 and costs

The Native Commissioner entered the following judgment:—

> "For defendant with costs. The 10s. tendered to be paid to plaintiff."

Against this judgment an appeal has been lodged in this Court on the grounds that it was bad in law and against the weight of evidence.

Counsel for appellant in his argument depends on the question that the case in the Lower Court had been badly handled and makes the suggestion that the record be returned to the Native Commissioner for further evidence.

We still have to learn that a person may be fined in his absence and if Chiefs are in the habit of doing so on the pretence that it is Native Law and Custom, then it cannot be too strongly stressed that such a procedure or cusotm is opposed to the principles of public policy or natural justice. Even in Chiefs' Courts the maxim "*audi alteram partem*" should be applied.

There are many unsatisfactory features in this case which culminate in a judgment which this Court cannot but regard as unsatisfactory and which cannot be allowed to stand. The summons is dated the 15th day of May, 1955, and the date fixed for entry of appearance is the 13th day of May, 1955.

The summons is supported by the particulars of claim in which the plaintiff's case is clearly set out and there is the plea of the defendant to that claim made on the 19th day of April, 1955.

Notwithstanding this the record shows that on the day when the trial commenced—the date does not clearly appear—the Native Commissioner took a fresh claim from plaintiff and recorded a new plea for defendant.

In his plea the defendant tendered payment of 10s. to plaintiff which tender was refused. The tender was not implemented by payment into Court in terms of Rule 45 (6) but was nevertheless apparently looked upon by the Native Commissioner as being in order.

Plaintiff, in the claim, recorded by the Native Commissioner valued his sheep at £7 each and gave evidence that they were purchased as lambs for £3 each. Defendant valued them at £2 each though he admitted they were not Native sheep and the Native Commissioner accepted the value of £2 without any explanation.

Actually the customary procedure followed in Zululand when an animal is attached for a monetary fine is to sell the animal for a fair price and take from the proceeds the amount of the fine and return the excess to the person fined. The defendant (respondent) admitted this in argument before this Court.

The fine imposed on the second occasion for contempt of Court was admittedly imposed in the absence of the accused and was irregular.

The final judgment for defendant entered by the Native Commissioner carried with it an order for the 10s. tendered to be paid to plaintiff but surely the judgment should have read for plaintiff for 10s. and surely such latter judgement should have ensured that plaintiff be awarded costs.

These unsatisfactory features mentioned above may not be exhaustive but they are sufficient to show that the case was wrongly decided.

Counsel for appellant (plaintiff) suggested that the case be remitted for further action by the Native Commissioner but this Court does not think such a course desirable. However, in order to save further unnecessary litigation and costs this Court has decided to make the best of the case as it now is.

This Court accordingly accepts that the value of each sheep attached is £3 and that the plaintiff was in fact fined £5 and £2 on the first occasion and that he was wrongly fined on the second occasion. It accepts too that the costs of attachment, viz. 10s. correctly forms a charge against the plaintiff.

This means that the plaintiff was indebted to the defendant in the sum of £7. 10s. for the payment of which defendant is entitled to retain three of the five sheep less £1. 10s. (that is £9 less £1. 10s.) The other two sheep attached must be returned to plaintiff.

It is therefore ordered that the appeal be and it is hereby upheld with costs; the judgment of the Native Commissioner is set aside and for it is substituted:—

> "For plaintiff for the return of £1. 10s. and two of the five sheep or their value (which is fixed at £3 each) and costs."

It is perhaps necessary to add that plaintiff is not debarred by anything in this judgment from exercising such rights of appeal as he may have against the Chief's judgments under which he was fined £5 and £2 on the first occasion.

For Appellant: Mr. S. H. Brien of Wynne & Wynne.

For Respondent: In person.

NORTH-EASTERN NATIVE APPEAL COURT.

GUMEDE *v.* BUTELEZI.

N.A.C. CASE No. 42 OF 1955.

DURBAN: 31st October, 1955. Before Steenkamp, President, Ashton & Ahrens, Members of the Court.

PRACTICE AND PROCEDURE.

Application for condonation of late noting of appeal from Chief's Court to Court of Native Commissioner.

Summary: Appellant was sued in a Chief's Court for damages for seduction and he stated that the Chief dismissed the claim but when after eighteen months he came back from Johannesburg to which place he went immediately after the case he found that judgment against him for one beast (or £5) and costs had been registered against him. He applied to the Native Commissioner's Court to extend the time for noting an appeal against the Chief's judgment but this was refused and he has now appealed to this Court against that refusal.

Held: (1) Appellant could have applied to the Native Commissioner for rectification of the Chief's judgment but would have had to cite the other party to the judgment, the Chief who presided and delivered the judgment and such other officers of the Chief's Court whom circumstances might indicate should be cited.

Held: (2) That the Chief's reasons for judgment were such that the application for condonation of late noting should have been granted.

Cases referred to:

Kunene *v.* Madondo, 1955, N.A.C. 75 (N.E.)

Statutes, etc., referred to:

Rule 9 (3) of Chiefs' and Headmens' Civil Courts Regulations (Government Notice No. 2885 of 9.11.51.)

Appeal from the Court of the Native Commissioner, Stanger.

Steenkamp (President), delivering the judgment of the Court:—

In the Native Commissioner's Court the appellant made application for the condonation of the late noting of an appeal from the judgment of the Chief.

According to the affidavit filed in support of the application the appellant avers that in the Chief's Court he was sued by the respondent for damages for seduction and that the Chief dismissed the claim. The appellant returned to his work in Johannesburg where he stayed for 18 months. When he returned home he discovered that the judgment was registered in the Native Commissioner's office as one for plaintiff (respondent) for one beast or its value £5 and costs £2. In fact, according to the

notice of hearing of appeal (form N.A. 503) against judgment of a Chief's Court the claim is stated to have been for two head of cattle for seduction of plaintiff's (respondent's) ward Nukeni (or their value of £11.) The judgment of the Chief is recorded as one for plaintiff as prayed with costs of £1. 19s. 6d.

The application came before the Native Commissioner's Court at which plaintiff (respondent) was present and he stated that it is correct that judgment was given in his favour by the Chief and not as stated by applicant (appellant) that the claim had been dismissed.

The Native Commissioner dismissed the application for condonation as he was not satisfied on applicant's unsupported affidavit that the Chief would have acted in the manner claimed by applicant.

An appeal has now been noted to this Court on the following grounds:—

"1. The Native Commissioner erred in dismissing the application.

2. The Native Commissioner should have permitted the appellant to have led the evidence or the witnesses in attendance for the purpose of supporting his application.

3. In view of the allegation made by the appellant, defendant, it was clear that his failure to appeal timeously was in no way due to any fault on his part, and the application should have been granted."

To arrive at an equitable solution of the case it is necessary to quote paragraph 4 of applicant's affidavit which reads as follows:—

> "4. That I dispute this entry in the register and would pray the Court to review or re-try this case to avoid any unpleasantness that may arise as a result of this wrong entry. Further I was not aware of this registration until my return from Johannesburg and I could not during my absence institute proceedings, and I have taken the most immediate steps to bring this matter to Court. I pray that the Court condone the late lodgment of appeal herein as I have a full belief that I have a good and bona fide defence against this claim."

From this it is clear that what the applicant desired the Native Commissioner to do was either to review or re-try the case whichever the Court of the Native Commissioner might consider a most appropriate or expedient procedure.

Rule 9 (3) of the Chiefs' Courts Rules provides for a Native Commissioner on good cause shown to extend the period for noting an appeal.

The applicant could have applied, as a sole application for a rectification of the Chief's judgment but as pointed out in the case of Kunene *v.* Madonda, 1955 N.A.C., 75 (N.E.) on 15.7.1955, such a step calls in an application to the Native Commissioner for the citation of the other party to the judgment, the Chief who presided and delivered the judgment and such other officers of the Chief's Court whom circumstances indicate are necessary to be cited.

It is our view that the Native Commissioner could have dealt with the matter as an application for the condonation and thereafter the trial of the appeal if condonation is granted.

The Chief's reasons clearly indicate that the application for condonation should have received favourable consideration by the Native Commissioner especially as indicated by the Chief that the girl's evidence was not thoroughly satisfactory.

The Chief's reasons for judgment coupled with the contents of appellant's affidavit are such that this Court has no hesitation in allowing the appeal with costs and altering the Native Commissioner's judgment to read:—

"Application for condonation is granted. Applicant to pay costs."

The record is returned to the Native Commissioner to try the action."

For Appellant: Mr. M. R. F. Steven.

For Respondent: In default.

NORTH-EASTERN NATIVE APPEAL COURT.

MSABALA *v.* NYATI.

N.A.C. CASE No. 41 OF 1955.

DURBAN: 2nd November, 1955. Before Steenkamp. President, Ashton and Ahrens, Members of the Court.

PRACTICE AND PROCEDURE.

Native Commissioner's Courts Interpleader claims.

Summary: Plaintiff said he bought a black and white cow from Mhlongo and while it was in his possession a Chief's Messenger attached it in execution of a judgment in favour of defendant against Mhlongo. Plaintiff asked the Native Commissioner's Court to declare that the cow was his or that defendant was not entitled to it. Defendant denied that Plaintiff bought the cow from Mhlongo or that the Chief's Messenger was holding it on his behalf; he declared that he was entitled to the cow and that it should be delivered to him. A note was made on the record that the "Messenger will not be joined and agreed to abide by judgment of Court" and it must be stated that the person concerned acted as messenger at the time of the attachment but was no longer in office when the case was heard.

Held: (1) That as the person who attached the cow was not a Messenger of the Native Commissioner's Court as defined in Rule 96 (1) and in fact was not a Chief's Messenger at the time action was brought he was nothing more than a "stakeholder or other custodian of movable property to which he lays no claim in his own right but to which one or more persons lay claim".

Held: (2) That the action could be regarded as an interpleader only if the provisions of Rule No. 70 (4) were complied with.

Held: (3) That despite the note on the record described in the summons above the provisions of the Rule cannot be regarded as having been satisfied.

Held: (4) That a real owner whose cattle have been attached for the debt of someone else does not lose his right to vindicate them; that the Rules of Chiefs' Courts do not provide for interpleader claims and that if the cow in question had been handed to defendant the action now on appeal would have been competent.

Held: (5) That as the cow is still in the hands of the messenger he should either hand the beast to one of the parties and let them decide the issue themselves or institute interpleader proceedings in terms of the rules.

Cases referred to:

Hlatshwayo *v.* Hlongwane, 1 N.A.C. (N.E.), 201.

Statutes, etc. referred:

Jones & Buckle, 5th Edition, Page 389.

Rule 70 (4) Native Commissioners' Courts Rules (Government Notice No. 2286 of 9th November, 1951).

Rule 96 (1) Native Commissioners' Courts Rules (Government Notice No. 2286 of 9th November, 1951).

Appeal from the Court of the Native Commissioner, Umzinto.

Steenkamp (President), delivering the judgment of the Court:—

This appeal was not timeously noted but an application made for condonation was granted and argument proceeded as if it were noted in time.

The amended declaration to plaintiff's summons averred that plaintiff had bought a black and white cow from one Mhlongo and that while it was in plaintiff's possession the Messenger of the Chief's Court attached it in execution of a judgment defendant had been granted against Mhlongo; plaintiff asked for an order declaring that the cow was his property or that defendant was not entitled to it.

Defendant denied that plaintiff had bought the cow from Mhlongo and that the Chief's Messenger was holding the cow on his (defendant's) behalf; he declared that he was entitled to the cow and that the Chief's Messenger should deliver it to him.

There is a note on the record to this effect—

> "Messenger will not be joined and agreed to abide by judgment of Court."

and it must here be stated that the person concerned acted as Chief's Messenger at the time of the attachment but was no longer in office at the time the case was heard. It must also be stated that the cow would seem to have been in the possession of the person who attached it.

At the outset the question must be raised whether the plaintiff has not misconceived his right of action and although neither counsel in argument before this Court raised the point this Court is of opinion that for the just and proper consideration of the case this question must first be decided.

The Rules for Native Commissioners' Courts (Government Notice No. 2286 of 1951) contain the following relevant provisions under the heading "Interpleader claims":—

> "70 (4) An applicant other than the messenger shall annex to the summons sued out in terms of sub-rule (5) an affidavit setting out—
>
> (*a*) that he claims no interest in the subject matter in dispute other than for charges or costs; and
>
> (*b*) that he does not collude with any of the claimants; and
>
> (*c*) that he is willing to pay or transfer the subject matter into court or dispose of it as the Court may direct."

They are relevant because the person who attached the cow was not a Messenger of the Native Commissioner's Court as defined in Rule 96 (1) nor was he, in fact, a Messenger of the Chief's Court at the time the action was brought by plaintiff and it is clear that he was nothing more than a "Stakeholder" or other custodian of movable property to which he lays no claim in his own right but to which two or more persons lay claim" (Jones & Buckle, Fifth Edition, at page 389).

Such being the case the action could only be regarded as an interpleader if the provisions of Rule No. 70 (4) were complied with and this Court holds that despite the note on the record mentioned in the fourth paragraph of this judgment the provisions of the Rule cannot be regarded as having been satisfied.

It seems clear from the judgment in the case of Hlatshwayo *v.* Hlongwane 1 N.A.C. (N.E.) 201 at page 202 that "a real owner whose cattle have been attached for the debt of someone else does not lose his right of vindication" and it is also clear that the Rules for Chiefs' Courts do not provide for interpleader claims. It follows that plaintiff had a vindicatory action against the person who had deprived him of the cow and in whose possession it then was. If the cow had been handed over to defendant the action now on appeal before us would have been proper and competent but it would seem that it is still in the hands of the ex-Messenger of the Chief's Court and he should either institute interpleader proceedings in the Native Commissioner's Court in terms of the rule or he should hand the beast to plaintiff or defendant and let them decide the issue themselves.

The procedure to be followed in the matter is one worthy of careful consideration in view of the onus of proof and much was said in argument before us on this subject as well as the sufficiency of the evidence led in the Court of the Native Commissioner.

In all the circumstances the Court is of opinion that plaintiff's claim in the Native Commissioner's Court should have been dismissed with costs, that judgment should not have been given for defendant and that as the appeal to this Court was decided on a point not taken by Counsel for either party, each party should pay his own costs.

It is ordered therefore that the appeal be and it is hereby allowed; the judgment of the Native Commissioner is set aside and for it is substituted "Summons is dismissed with costs"; each party will pay his own costs of appeal.

For Appellant: Adv. Hourquebie (instructed by L. M. Mandy).

For Respondent: Mr. Pullin (instructed by J. O. Blamey).

SOUTHERN NATIVE APPEAL COURT.

MAHUZA *v.* VANQA.

N.A.C. CASE No. 51 OF 1955.

KING WILLIAM'S TOWN: 15th November, 1955. Before H. Balk. President, Warner and Yates, Members of the Court.

LAW OF DELICT.

Action for damages for injuries sustained in accident—Driver of vehicle employed by S.A. Native Trust and only hired by defendant—Defendant absolved from liability as he exercised no control over driving of vehicle.

Summary: Defendant hired a lorry from the South African Native Trust for the purpose of conveying his maize crops from his land to his kraal. The driver of the lorry was in the employ of the South African Native Trust. During the course of the work plaintiff, a minor, who was assisting with the work of loading and unloading, and who was riding on the back of the lorry on one of the trips, was injured when the lorry capsized.

Plaintiff, duly assisted, subsequently sued defendant for damages in respect of the injuries he received as a result of defendant's negligence.

Held: That defendant cannot be held liable since the driver of the vehicle was in the employ of the South African Native Trust at the time the lorry overturned, and defendant had no right to control the driving.

Held further: That no negligence can be attributed to defendant as he was not with the vehicle when it overturned, and could not reasonably have foreseen that it might overturn.

Cases referred to:

Joffe & Co. Ltd. *v.* Hoskins & Ano., 1941, A.D. 431.

Works of reference referred to:

McKerron's " Law of Delict " (3rd Edition).

Appeal from the Court of the Native Commissioner, Lady Frere.

Balk (President):—

In this case the plaintiff (present appellant), a minor duly assisted, sued the defendant (now respondent) in a Native Commissioner's Court for damages in the sum of £300 in respect of injuries received as a result of a lorry overturning.

At the conclusion of the hearing in that Court, the summons was dismissed with costs.

The appeal is brought on the following grounds:—

" 1. That the judgment is against the weight of evidence.

2. That the judgment is bad in law in that—

(*a*) The Additional Assistant Native Commissioner erred in holding that the driver was not driving negligently when the lorry capsized.

(*b*) The Additional Assistant Native Commissioner erred in holding that the defendant was not negligent in allowing plaintiff to sit on top of the load of mealie stalks at the time the lorry was in motion.

(*c*) The Additional Assistant Native Commissioner erred in holding that the defendant could not have reasonably foreseen or anticipated the likelihood of an accident, resulting from the plaintiff sitting on top of the mealie stalks on an open lorry whilst it was in motion.

(*d*) The Additional Assistant Native Commissioner erred in failing to take account of the fact proven that the lorry was not a passenger vehicle licensed to carry passengers and properly constructed for that purpose. This fact and knowledge on the part of the defendant cast an onus on him to exercise extra care to protect the plaintiff, a minor and school child, which defendant failed to do."

It is common cause that—

(1) the defendant hired a lorry from the South African Native Trust for the purpose of conveying his maize crops from his land to his kraal;

(2) the services of certain school children, including the plaintiff, were obtained by the defendant for the purpose of loading maize on to the lorry at his land and unloading it at his kraal;

(3) some of these children, including the plaintiff, rode on the lorry on the trips between the defendant's land and his kraal;

(4) the lorry capsized on the second of these trips as a result of which the plaintiff sustained certain injuries.

The plaintiff bases his claim on the negligence of the driver of the lorry and/or the defendant's negligence in permitting the plaintiff to sit on top of the maize stalks whilst they were being conveyed in the lorry from the defendant's land to his kraal.

The only evidence indicative of the cause of the lorry overturning is that of the driver who was called by the plaintiff. The driver's testimony in this respect reads as follows:—

> "I proceeded with this load to defendant's kraal together with plaintiff and other older boys sitting on top of stalks on lorry as per the first trip. On the way at the junction of Mount Arthur-Glen Adelaide Road the lorry capsized, and plaintiff was one of those injured. When we left the land for defendant's kraal with load I was not far away from defendant and he could see us. At no time did defendant say children must not ride on stalks. After that I did not have any conversation with defendant. When lorry capsized I sent a child to call defendant. He came. I told him lorry was travelling at 15 miles an hour. The lorry bumped on ground which was sloping and as a result the roof shook. The accident was as a result of the inequality of the road. It bumped and capsized about five paces further.
>
> X.X. By Mr. Tsotsi:—
>
> I am at all relevant times employed and paid by the South African Native Trust. During the reaping season Trust sends out lorries for bringing in of crops. The hirer pays the money to Trust through me and I take it to Mr. McCune. The person who hires does not give me instructions to drive lorry, I use my discretion. Lorry did not capsize through my negligence. Police made investigation but I was not prosecuted. I have not been dismissed from South African Native Trust as a result of the accident.
>
> On trip on which accident took place I had a half load on lorry. I don't know why the lorry overturned. The teacher knew the arrangement when I went to him. Defendant only told me to off-load mealies at his kraal near the fowl run. At time of accident I was alone. I was not controlled by anyone."

The cause of the lorry's overturning does not emerge clearly from this evidence. But even assuming that it can be properly inferred therefrom that the lorry capsized owing to the driver's negligence on the ground that his speed of 15 miles per hour was excessive, regard being had to the uneven nature of the terrein which the lorry was traversing at the time and bearing in mind that no other reason for its overturning suggests itself from the evidence, the defendant still cannot be held to be liable since, as conceded by counsel for the appellant, it is clear from the driver's testimony supported by that of the Assistant Native Commissioner, who also gave evidence for the plaintiff, that the driver was in the employ of the South African Native Trust at the time the lorry overturned; and it is equally clear from that evidence that the defendant had no right to control the driving, see *McKerron's Law of Delict* (Third Edition), at pages 122 and 123.

Turning to the remaining basis of claim, viz., the alleged negligence on the part of the defendant in permitting the plaintiff to sit on top of the maize stalks whilst they were being conveyed in the lorry from the defendant's land to his kraal, it is manifest from the evidence that the driver and not the defendant told the plaintiff to board the lorry; but, to my mind, the Court *a quo* properly found on the probabilities disclosed by the evidence that the defendant saw the children, among whom was the plaintiff, riding thereon.

It seems to me the test to be applied here is that quoted with approval in Joffe & Co., Ltd. *v.* Hoskins & Another, 1941, A.D. 431 at page 451, viz.—

> "Could the infliction of injury to others have been reasonably foreseen? If so, the person whose conduct is in question must be regarded as having owed a duty to such others—whoever they might be—to take due and reasonable care to avoid such injury."

I do not see how the defendant in the instant case could reasonably have foreseen that the lorry would overturn; for, according to the evidence, he was not with the lorry at the time but some distance from it and there is nothing to show that any circumstances indicating that the lorry may overturn, such as, for example, its excessive speed, came to his notice.

Applying the test quoted above, the defendant cannot in the circumstances of this case be held to have been negligent and the factors mentioned in the last ground of appeal are irrelevant.

It follows that the appeal falls to be dismissed with costs.
Warner (Permanent Member): I concur.
Yates (Member): I concur.
For Appellant: Mr. H. J. C. Kelly, Lady Frere.
For Respondent: Adv. E. N. Egan, Port Elizabeth.

SOUTHERN NATIVE APPEAL COURT.

KORSTEN AFRICAN RATEPAYERS ASSOCIATION *v.* **PETANE.**

N.A.C. CASE No. 35 OF 1955.

KING WILLIAM'S TOWN: 17th November, 1955. Before Balk, President, Warner and Yates, Members of the Court.

LAW OF PROCEDURE.

Jurisdiction of Native Commissioner's Court concerning voluntary or unincorporated association and a Universitas *discussed—Test to be applied in deciding upon application for absolution judgment—Costs of appeal.*

Summary: Plaintiff, the Korsten African Ratepayers' Association, claimed from defendant the sum of £44. 4s. 6d., a Gestetner duplicator and certain books and records which, it averred, had come into defendant's possession whilst he was the plaintiff Association's secretary.

In his plea, defendant denied, *inter alia,* that the plaintiff Association existed in law; alternatively, if the Court found that it did legally exist, he pleaded that it had no *locus standi in judicio.*

At the conclusion of plaintiff's case the Native Commissioner, on the application of defendant, gave judgment of absolution from the instance with costs.

The plaintiff Association appealed against this judgment on the grounds that it had made out a *prima facie* case, and that the Court *a quo* should have proceeded to hear the defence evidence.

Held: That the plaintiff Association falls to be regarded as a voluntary or unincorporated Association and not a *Universitas*; that the Native Commissioner's Court therefore had jurisdiction to hear the action, and that in terms of Rule 34 of the Rules for Native Commissioners' Courts it was competent for the plaintiff Association to sue *eo nomine.*

Held further: That whilst there were adverse features which undoubtedly detracted from the merits of plaintiff Association's case, they were not of such a nature as to lead to the conclusion that a reasonable man *might* not have found for it in the light of the evidence as a whole, and the Native Commissioner should have had no hesitation in refusing the application for absolution had he applied the correct test.

Cases referred to:

Ndongeni *v.* Ngodwana, 1, N.A.C. (S.D.) 93.

Myburgh *v.* Kelly, 1942, E.D.L.D. 202.

Gumede *v.* Bandhla Vukani Bakithi, Ltd., 1950 (4), S.A. 560 (N.P.D.).

Morrison *v.* Standard Building Society, 1932, A.D. 229.

Klerksdorp & District Muslim Merchants' Association *v.* Mahomed & Another, 1948 (4), S.A. 731 (T.P.D.).

Leschin *v.* Kovno Sick Benefit and Benevolent Society, 1936, W.L.D. 9.

Vorster *v.* John Jack, Ltd., 1925, T.P.D. 793.

Statutes, etc., referred to:

Government Notice No. 2886 of 1951.

Native Administration Act, No. 38 of 1927.
Companies Act, No. 46 of 1926.

Appeal from the Court of the Native Commissioner, Port Elizabeth.

Balk (President):—

This is an appeal from the judgment of a Native Commissioner's Court, decreeing absolution from the instance, with costs, on the application of the defendant's attorney at the close of the plaintiff Association's (present appellant's) case, in an action in which it claimed from the defendant (now respondent) the return of £44. 4s. 6d., a Gestetner duplicator and certain books and other records which, it was averred, had come into his possession when he was its secretary. The plaintiff Association also sought an order requiring the defendant to account for other moncy collected by him on its behalf and to pay the amount found to be due, to it.

The defendant pleaded as follows:—

"(*a*) Defendant has no knowledge of the existence of the plaintiff Association and denies that such Association exists in law.

(*b*) Alternatively, and only in the event of the above Honourable Court finding that it does legally exist then defendant pleads that it has no *locus standi in judicio.*

(*c*) Alternatively, and only in the event of the above Honourable Court holding that plaintiff Association has *locus standi in judicio* then defendant pleads as follows:—

(1) Defendant denies that he was ever the secretary of the plaintiff Association.

(2) Defendant denies that he has ever collected moneys on behalf of the plaintiff either as alleged or at all.

(3) Defendant is the present Secretary of the Korsten Bantu Ratepayers' Association previously known as the Korsten African Ratepayers' Association.

(4) The said Korsten Bantu Ratepayers' Association is the lawful owner of Gestetner machine and certain stationery which is stored at its office at 162 Durban Road, Korsten.

(5) The sum of £44. 4s. 6d., referred to in plaintiff's summons is the lawful property of the Korsten Bantu Ratepayers' Association and is in any event not in the possession of the defendant.

(6) Defendant denies that plaintiff has any right in and to the articles and moneys claimed and puts plaintiff to the proof thereof.

(7) Alternatively and in any event defendant denies that he is liable to plaintiff for any of the articles or moneys claimed.

Wherefore defendant prays that plaintiff's summons be dismissed with costs of suit."

The appeal is brought on the following grounds:—

"(*a*) Judgment is bad in law in that there was sufficient evidence before Court to put defendants on their defence.

(*b*) Plaintiff had made out a *prima facie* case.

(*c*) The fact that there are certain inconsistencies in plaintiff's evidence is not sufficient to justify the Court in granting absolution.

(*d*) The said judgment is against the evidence and weight of evidence in that plaintiff had made out at least a *prima facie* case."

The defendant neither led evidence nor closed his case, so that the test to be applied in deciding whether or not absolution from the instance should be decreed at the close of the plaintiff Association's case, is whether there is evidence upon which a reasonable man *might* find for the plaintiff Association and not whether he *ought* to do so, see Ndongeni *v.* Ngodwana, 1 N.A.C. (S.D.) 93.

It emerges from the pleadings and from the evidence for the plaintiff Association that the defendant was its secretary during the year 1952, when it was known as the Korsten Bantu Ratepayers' Association, that his term of office as such expired in October of that year, that he was not re-elected as its secretary, that after the expiration of his term of office as its secretary he retained possession of its Gestetner duplicator and certain of its books and other records and did not return them notwithstanding demand, that on the 18th October, 1953, it was duly decided at a properly constituted meeting of the members of the Korsten Bantu Ratepayers' Association to change its name to "Korsten African Ratepayers' Association", that later at a similarly constituted meeting an amended constitution (Exhibit "H") was duly adopted in lieu of its previous constitution (Exhibit "G") and that the institution of the instant action was authorised at a properly constituted meeting of the members of the plaintiff Association.

As pointed out by counsel for respondent, the receipt (Exhibit "J") issued on the 10th May, 1953, in respect of the £44. 4s. 6d., is signed by one Chola, in his capacity as Chairman of the Korsten Bantu Ratepayers' Association, and by the defendant as secretary of that Association; and, as the present chairman of the plaintiff Association, John Ngcangca, admitted in cross-examination that this amount was paid to the late Chola when the receipt (Exhibit "J") was issued and as there is nothing to indicate that the money came into the defendant's hands subsequently, the latter does not appear to have a case to meet on this score. It should be added that there is evidence that the defendant collected moneys other than the £44. 4s. 6d. on behalf of the plaintiff Association.

Counsel for respondent contended that the plaintiff Association had not made out a *prima facie* case in that proof of the averments on which its claim was founded, was lacking, i.e. that there was no proof that the Korsten Bantu Ratepayers' Association had changed its name to "Korsten African Ratepayers' Association" as the plaintiff Association is known, or that it had adopted the constitution (Exhibit "H") or that the defendant was in possession of the duplicator, books or other records claimed.

In elaboration of this contention Counsel submitted that the election of Samuel Giba, first witness for the plaintiff Association, as Secretary of the Korsten Bantu Ratepayers' Association at its meeting held on the 4th October, 1953, *vice* the defendant, was void in that, according to the relevant constitution (Exhibit "G"), Giba had to be a member of the lastmentioned Association to qualify for the secretaryship; and to become a member of that Association he had to be a ratepayer which, it was manifest from his own testimony, he was not. It followed that it was not competent for Giba to convene the meetings at which it is alleged the Korsten Bantu Ratepayers' Association changed its name to "Korsten African Ratepayers' Association" and the latter adopted the amended constitution (Exhibit "H"), so that in fact the plaintiff Association had no legal existence. Counsel added that the qualification of membership of the Association as a *sine qua non* for the secretaryship could properly be inferred from sub-paragraph 5 (1) and paragraph 16 of the constitution (Exhibit "G").

To my mind this submission is not sound as the mere grouping in sub-paragraph 5 (1) of the Secretary with the Chairman and Treasurer of the Association as officers thereof and the stipulation therein that these officers were to be persons of good reputation as the Trustees of the Association, does not necessarily imply that only a member of the Association is eligible for the secretaryship. Still less can such a condition be implied from paragraph 16 which merely provides for the formation and functioning of an executive committee and does not even mention the secretary; and nowhere else is any such condition stipulated or implicit in the constitution (Exhibit "G").

Turning to the duplicator, books and other records claimed by the plaintiff Association, their possession by the defendant was averred in the claim and as this averment is not inconsistent with the defendant's plea that this duplicator and these books and other records are at the office of the Korsten Bantu Ratepayers' Association of which he is the secretary, the averment in question must, in terms of Sub-rule 45 (8) of the Rules for Native Commissioners' Courts, published under Government Notice No. 2886 of 1951, as amended, be taken to be admitted by the defendant. Moreover it is manifest from the evidence that the defendant was the Secretary of the Korsten Bantu Ratepayers' Association up to October, 1952, and that he did not then or later return the books of that Association to it before or after it changed its name to "Korsten African Ratepayers' Association"; and as, in terms of sub-paragraph 5 (3) of the constitution (Exhibit "G"), the defendant had to keep these books, it may properly be inferred that they are still in his possession.

Admittedly, as pointed out by counsel for respondent, there are inconsistencies in the evidence for the plaintiff Association. Giba admitted in cross-examination that he had written the letter (Exhibit "F"), in his capacity as secretary of the plaintiff Association, to the defendant on the 20th October, 1953, under the heading "K.B.R.A.", being the abbreviation for Korsten Bantu Ratepayers' Association"; whereas, according to his (Giba's) evidence and that of the only other witness called by the plaintiff Association, viz. Ngeangea, its name had been changed to "Korsten African Ratepayers' Association" a few days earlier, i.e. on the 18th October, 1953, and there appears

to be no explanation why in these circumstances the heading "K.B.R.A." appeared on the letter in question. Again the evidence of Giba and Ngcangca as to the attitude of the Reverend Boko towards Giba's election as secretary of the plaintiff Association on the 4th October, 1953, is inconsistent.

But it seems to me that, whilst these features undoubtedly detract from the merits of the plaintiff Association's case, they are not of such a nature as to lead to the conclusion that a reasonable man *might* not find for it in respect of the items claimed, exclusive of the £44. 4s. 6d., in the light of the evidence as a whole, from which the facts on which its case rests, i.e. the facts set out above, clearly emerge, see Myburgh *v.* Kelly, 1942, E.D.L.D. 202, particularly at pages 206 and 207.

It should here be mentioned that in the light of Ngcangca's explanation in his testimony, I do not regard as sound the submission by counsel for respondent that an inference adverse to the plaintiff Association's case can properly be drawn from the note at the foot of the notice (Exhibit "I").

It is manifest from the Acting Native Commissioner's reasons for judgment that in deciding on the application for absolution, he did not apply the correct test, i.e. the one set out above, as he was under the impression that since the plaintiff Association had not made out a *strong prima facie* case, he was bound to grant the application.

He also came to the conclusion that the election of Giba as secretary of the plaintiff Association was void and that it was therefore not competent for him (Giba) to give evidence for it.

Apart from the fact that this proposition, i.e. that it was incompetent for Giba to testify for the plaintiff Association, finds no support in law, there is, as pointed out above, nothing in the relevant constitution (Exhibit "G") requiring the secretary of the Association to be a member thereof or a ratepayer; and as, according to the evidence, Giba was duly elected as secretary of the plaintiff Association on the 4th October, 1953, at a properly constituted meeting of its members, he falls at this stage to be regarded as the lawful incumbent of this post. It is true that, as pointed out by counsel for respondent, the witnesses for the plaintiff Association admitted in the course of their testimony that only a member of the Association could be appointed as its secretary. But as I understand this evidence, it only forms an expression of opinion by the witnesses in regard to the position in the respect in question as emerging from the Association's written constitution and is therefore of no probative value.

The aspects dealt with above do not, however, conclude the matter, as the question of whether the plaintiff is a voluntary association, i.e. an unincorporated association, or a *universitas* remains to be considered; for, in the latter event a Native Commissioner's Court would have no jurisdiction to hear the instant action in that a *universitas,* possessing as it does, a legal *persona* which is quite apart from that of its members, does not fall within the definition of the word "Native" contained in section *thirty-five* of the Native Administration Act, 1927, as amended, and section *ten* of this Act limits the jurisdiction of Native Commissioners' Courts to the hearing of civil matters between Natives, see Gumede *v.* Bandhla Vukani Bakithi, Ltd., 1950 (4), S.A. 560 (N.P.D.). In the former event, i.e. if the plaintiff be a voluntary or unincorported association, the question of compliance with Rule 34 of the Rules for Native Commissioners' Courts, published under Government Notice No. 2886 of 1951, as amended, would arise.

It seems clear from the plaintiff Association's first constitution (Exhibit "G") that it was capable of owning property apart from its members and had perpetual succession, i.e. it had all the characteristics of a *universitas,* see Morrison *v.* Standard Building Society, 1932, A.D. 229. But from the admission by

Ngcangea under cross-examination, it appears that the plaintiff Association was formed after the 31st December, 1939, i.e. in the year 1950, when it broke away from the parent Association; and as, according to the plaintiff Association's constitution (Exhibit "G") one of the objects of its business is gain, and as the evidence indicates that it was not registered or formed as required by section 4 *bis* of the Companies Act, 1926, as amended, to make it a body corporate, it cannot be regarded as such a body, see Klerksdorp & District Muslim Merchants' Association *v.* Mahomed & Another, 1948 (4) S.A. 731 (T.P.D.). Moreover the plaintiff Association's amended constitution (Exhibit "H") which, according to the evidence, forms its present constitution, does not make provision for it to hold property apart from its members, so that in any event it falls to be regarded as a voluntary or unincorporated Association and *not* a *universitas,* see Lesehin *v.* Kovno Sick Benefit and Benevolent Society, 1936, W.L.D. 9.

Counsel for respondent also took this view but she submitted that as a voluntary association the plaintiff had no *locus standi in judicio* apart from its individual members.

But she overlooked Rule 34 of the Rules for Native Commissioners' Courts referred to above in terms of which, i.e. sub-rule (1) read with sub-rule (5) thereof, it was competent for the plaintiff Association to sue *eo nomine.*

The plaintiff Association, however, failed to respond to a notice by the defendant requiring it to furnish him with the names and places of residence of its members in terms of the said sub-rule 34 (1) so that in any event it was not competent for the Court *a quo* to have proceeded to judgment, see Vorster *v.* John Jack, Ltd., 1925 T.P.D. 793. It should be added that the wording of Rule 6 referred to in that judgment and of the said Rule 34 is identical in all material respects.

In the summons the defendant is described as a Native and it is implicit in the pleadings and evidence that the plaintiff Association is composed of Natives, as was conceded by Counsel for respondent. That being so and as, for the reasons given above, the plaintiff Association is not a universitas but a voluntary or unincorporated Association, the Court *a quo* had jurisdiction to hear the instant case.

As is clear from what has been stated above, the Acting Native Commisisoner should have had no hesitation in refusing the application for absolution had he applied the correct test.

It follows that the appeal succeeds and the judgment of the Court *a quo* falls to be set aside and the case remitted to the Acting Native Commissioner for trial to a conclusion. But as it appears from his reasons for judgment that he has resigned from and left the Public Service, a trial *de novo* before another judicial officer becomes necessary.

As the appeal has succeeded on the ground advanced by the appellant, there appears to be good reason for awarding him costs of appeal as was done in Myburgh's case (*supra*).

In the result I am of opinion that the appeal should be allowed, with costs, that the judgment of the Court *a quo* should be set aside and the case remitted to that Court for trial *de novo* before another judicial officer on the instant pleadings and other papers filed therewith. Costs already incurred in the Court below to abide the result of the action in that Court.

Yates (Member): I concur in the President's judgment.

Warner (Permanent Member) Dissentiente on question of costs of appeal.

In this case both parties are at fault. Plaintiff is at fault in that (1) he did not allege in his particulars of claim that the parties are Natives so that it could be ascertained whether the Native Commissioner's Court had jurisdiction to try the action, (2) he failed to furnish the names and addresses of the members of the plaintiff Association when called upon to do so, and (3) he closed his case when he had not established a *prima facie* case in support of his allegation that defendant had taken an amount of £44. 4s. 6d. into his possession.

Defendant was at fault in applying for a judgment of absolution from the instance when plaintiff had established a *prima facie* case in regard to the property claimed other than money.

I agree that the judgment of absolution from the instance with costs should be set aside and the case remitted for further evidence, both parties being allowed to call such evidence, but consider that the costs of appeal should be costs in the cause.

SOUTHERN NATIVE APPEAL COURT.

NKWENTSHA *v.* **HLWATI.**

N.A.C. CASE No. 40 OF 1955.

KING WILLIAM'S TOWN: This 17th November. 1955. Before Balk, President, Warner and Yates, Members of the Court.

NATIVE CUSTOM.

Determination as to whether amount paid to girl's father constituted payment of dowry or damages for seduction—Customary union presumed where parties living together for lengthy period with permission of girl's father—Judicial Officer must record tribe to which parties belong.

Summary: Plaintiff paid £15 to Nokomete's father as first instalment of the dowry for Nokomete. With the permission of the father, plaintiff and Nokomete then lived together for a lengthy period. In a subsequent action for adultery against defendant, Nokomete's parents (who gave evidence for the defendant) stated that the payments made by plaintiff formed damages for seduction and not instalments in respect of dowry.

Held: That the fact that Nokomete was permitted by her father to live with plaintiff for a lengthy period after her father had received the £15 for her from plaintiff raised the presumption that a customary union existed between Nokomete and plaintiff, and that in the absence of a rebuttal of that presumption the sums of money paid by plaintiff to Nokomete's father cannot be held to be damages for seduction.

Cases referred to:

Mpantsha *v.* Ngolonkulu & Ano., 1952 (1) N.A.C. 40 (S).
Ngcongolo *v.* Parkies, 1953 (1) N.A.C. 103 (S).
Ben *v.* Mococamba, 1 N.A.C. (S.D.) 94.
Matlala *v.* Tompa, 1 N.A.C. (N.E.) 404.

Statutes referred to:

Native Administration Act, No. 38 of 1927 [Sec. 11 (2)].

Appeal from the Court of the Native Commissioner, Cathcart.

Balk (President):—

This is an appeal from the judgment of a Native Commissioner's Court for defendant (now respondent), with costs, in an action in which he was sued by the plaintiff (present appellant) for three head of cattle or their value, £24, as damages for adultery and £50 as damages for assault.

In his particulars of claim the plaintiff averred that—

"1. The parties hereto are Natives as defined by Act No. 38 of 1927.

2. That plaintiff is the husband of Nokomete to whom he is married according to Native Law and Custom and the marriage subsists.

3. That on or about the 18th December, 1954, and at the Goshen Mission aforesaid, defendant wrongfully and unlawfully committed adultery with plaintiff's said wife.

4. That when plaintiff tried to effect a catch, defendant wrongfully and unlawfully assaulted plaintiff."

The defendant pleaded—

"(1) Paragraph 1 of plaintiff's particulars of claim is admitted.

(2) Defendant denies that plaintiff is the husband of Nokometi and puts plaintiff to the proof thereof.

(3) Defendant denies that he wrongfully and unlawfully committed adultery with plaintiff's said wife. By virtue of defendant's contention that plaintiff is not the husband of the said Nokomete and thus adultery could not have been committed. Alternatively defendant pleads that should it be found by the above Honourable Court that the said Nokometi is the lawful wife of the plaintiff, then and in that case defendant denies that he has committed adultery with plaintiff's wife, and puts plaintiff to the proof thereof.

(4) Defendant denies that he wrongfully and unlawfully assaulted the plaintiff on the 19th December, 1954, but states and avers that any action taken by him upon the body of the plaintiff was purely in self-defence as the plaintiff was carrying a stick and was approaching defendant in a threatening attitude and did in fact assault the defendant.

(5) Defendant therefore denies that plaintiff has suffered damage as detailed in clause 5 (*a*) and (*b*) of plaintiff's particulars of claim and puts the plaintiff to the proof thereof.

(6) Wherefore defendant prays for judgment against plaintiff, with costs of suit."

The appeal is brought on the ground that the judgment is against the weight of the evidence.

The Native Commissioner found that the defendant had sexual intercourse with Nokomete on the night in question, and properly so on the evidence, for the defendant admitted in the course of his testimony that Nokomete was his sweetheart and that he had an appointment with her and she had joined him in bed that night; and his reason why intercourse had not taken place, viz. because he had fallen asleep, is in the circumstances singularly unconvincing. All that remains to be considered therefore in so far as the alleged adultery is concerned is whether or not the Native Commissioner erred in his finding that a customary union did not subsist between the plaintiff and Nokomete at the time she had intercourse with the defendant.

It is common cause that the plaintiff paid the sum of £25 in instalments of £15 and £10 to Nokomete's father in respect of her, that after these payments the plaintiff sent a beast to her father's kraal as dowry for her, that this beast was not accepted at that kraal and was thereupon taken back to the plaintiff by his messengers, that Nokomete had two children by the plaintiff and lived with him from February, 1948, to October, 1951, when her father had her brought back to his kraal.

The plaintiff's version is that the instalments of £15 and £10 constituted dowry payments for Nokomete whereas, according to her and her parents who gave evidence for the defendant, these instalments formed damages for her seduction by the plaintiff.

The evidence does not disclose the tribe to which Nokomete's father belongs and, as the quantum of damages for seduction varies amongst the different tribes, it is not possible to determine the scale of such damages, as sanctioned by custom, in this instance and it is therefore also not possible to take this scale into consideration in assessing the probative value of the evidence for the defendant in regard to the alleged customary union. In this connection attention is directed to Ben *v.* Mocacamba, 1 N.A.C. (S.D.) 94, and Matlala *v.* Tompa, 1 N.A.C. (N.E.) 404, in which the necessity for eliciting and recording the information in question as well as any other information that may be necessary to give effect to the provisions of section 11 (2) of the Native Administration Act, 1927, as amended, is stressed. The necessity for compliance with this injunction must be reiterated.

According to the evidence it is clear that Nokomete went with the plaintiff to Cape Town and lived with him there from February, 1948, until 1949, when he sent her to his kraal at Goshen in the Cathcart district, at which she remained and lived with the plaintiff on his return from Cape Town until her father had her brought back to his kraal, also at Goshen, in October, 1951. There is nothing in the evidence indicating that Nokomete's father took any steps to have her brought back from Cape Town, where it is admitted he had relatives at the time; nor is there anything in the evidence showing that he took any such steps from the time of her arrival at the plaintiff's kraal in 1949, until October, 1951, notwithstanding that that kraal was in the same area as his own, viz. at Goshen. It is true that Nokomete's father was away at East London during that time but he did not deny that he had received the £15 for her from the plaintiff in *1949*, as alleged by the latter in his testimony; and it is implicit in the evidence of Nokomete's mother who lived at her husband's kraal at Goshen that he was apprised of events in connection with Nokomete's relationship with the plaintiff. Admittedly Nokomete's mother was away at Johannesburg for a time but according to the father's evidence, she did not leave for that centre until June, 1950. In these circumstances it is difficult to escape the conclusion that Nokomete's father permitted her to continue to live with the plaintiff after he had received the £15 in 1949, until October, 1951. This, as contended by counsel for appellant, raises a presumption that the £15 was received by Nokomete's father as dowry for her and not as damages for her seduction and that in fact a customary union subsisted between the plaintiff and Nokomete at the time she had intercourse with the defendant, see Mpantsha *v.* Ngolonkulu and Another, 1952 (1) N.A.C. 40 (S) and Ngcongolo *v.* Parkies, 1953 (1) N.A.C. 103 (S). It is true that the beast sent by the plaintiff to Nokomete's father's kraal as dowry for her was not accepted. Plaintiff's messengers state in their evidence that this beast was not accepted at that kraal because a fee was demanded for its admittance there and they were not prepared to pay it. Nokomete's father gives no reason for the refusal of this beast at his kraal and her mother who denied that there had been any question of an entrance fee, added that she did not know what the beast was for and told the messengers to take it back. Whilst the non-acceptance of this beast undoubtedly lends colour

to Nokomete's version and that of her parents that the £25 paid for her by the plaintiff did not constitute dowry but was for damages for seduction, it seems to me that this factor does not rebut the presumption raised by Nokomete's having been permitted by her father to live with the plaintiff for a lengthy period after her father had received the £15 for her from the plaintiff; for the refusal of the beast may have been due to the non-payment of the entrance fee referred to above or it may have been dictated by a change of mind on the part of Nokomete's parents.

Moreover, as pointed out by counsel for appellant, it is clear from the evidence as a whole that whilst the plaintiff *twalaed* Nokomete in February, 1948, he did not make the first payment for her, i.e. the £15 to her father, until 1949, and yet, according to Nokomete's evidence for the defendant, her parents did not claim any damages from the plaintiff prior to the payment of this £15, which she stated the latter had sent to her father as dowry and not as damages. This factor goes a long way towards corroborating the plaintiff's testimony that Nokomete's parents agreed to his *twalaing* her and thus to his customary union with her.

As conceded by counsel for respondent, the letter of demand which attorney van Coller sent to the plaintiff in respect of the alleged balance of £10 for damages for Nokomete's seduction, does not detract from the plaintiff's case in view of the latter's explanation that Nokomete's father had denied knowledge of that letter and attorney van Coller's testimony that he had written it on the instructions of Nokomete's mother, that no further action was taken by him in this matter, that he could not say how it had been settled and that he could not deny that the plaintiff had come to his office and told him that Nokomete was his wife.

It follows from what has been stated above that the Court *a quo* erred in its finding that there was no customary union between the plaintiff and Nokomete at the time when the defendant had sexual intercourse with her and that it should have found that such a customary union did in fact exist at the time. That being so, the appeal succeeds in so far as the claim for damages for adultery is concerned.

Turning to the remaining claim, viz. that for damages for assault, it is manifest from the plaintiff's evidence that during the night in question he forcibly entered the hut at Nokomete's parents' kraal in which she and the defendant were; and according to her and the defendant's uncontraverted testimony, the plaintiff was then armed with a stick and the defendant was unarmed and, in addition, the plaintiff threatened to stab the defendant with a knife.

In these circumstances and bearing in mind that it is customary for a husband to "mark" an adulterer caught in adultery with the former's wife by a blow or blows with a stick, it seems to me that even accepting the plaintiff's evidence as to the force used against him by the defendant, it cannot properly be regarded as exceeding the bounds of self defence. The finding of the Court *a quo* to this effect cannot therefore, be said to be wrong.

In the circumstances I am of opinion that the appeal should be allowed in part, with costs, and that the judgment of the Court *a quo* should be altered to read "For plaintiff for three head of cattle or their value, £24, with costs, on the first claim and for the defendant, with costs on the remaining claim".

Yates (Member): I concur in the President's judgment.

Warner (Permanent Member) (Dissensiente):

The onus was on plaintiff to prove that a customary union subsisted between him and the woman Louisa at the time when he found her sleeping with defendant.

Plaintiff says that he took Louisa to Cape Town in 1948, with the permission of her parents, that he paid, as dowry, £25 representing five head of cattle, that a ceremony was held in Cape Town at which a goat was slaughtered so that she could drink milk. He called a witness, Mountain Piko, to give evidence that this ceremony was held. Plaintiff states, however: "The ceremony was before I paid the *lobolo*." As there cannot be a customary union without payment of dowry, the ceremony described by plaintiff is without any significance so that the only question to be decided is whether plaintiff has proved that the £25, admitted to have been paid to Louisa's father, was accepted by the latter as dowry for Louisa.

In regard to the first payment of £15, plaintiff makes the bald statement: "I paid the *lobolo* starting in 1949. I then paid £15." He does not say how it was paid nor has be brought any evidence to show that it was accepted as dowry for Louisa. Willy Mbebe, father of Louisa, gave evidence but does not mention the sum of £15 but his wife says: "Plaintiff sent a sum of £15 to my husband in East London. The money was sent from Cape Town. It was for damages."

Plaintiff says that a balance of £10 was paid during 1950, but does not say where or to whom it was paid. He admits that, in 1951, he received a letter from attorney van Coller, demanding, on behalf of Louisa's father payment of £10 being balance of damages resulting from the pregnancy of Louisa caused by plaintiff in 1948. Mildred Mbebe says that, acting on instructions of her husband, she consulted attorney van Coller and caused the letter of demand to be sent to plaintiff who, thereafter, paid the amount of £10 demanded. It seems to me that it is unlikely that she would have taken this action if the £10 had been paid already. I consider that it must be accepted that the £10 was paid after Mr. van Coller had sent plaintiff a demand for payment of balance of damages.

It is common cause that, in 1951, plaintiff offered a beast to the father of Louisa as dowry for her but it was refused and taken back to plaintiff. As plaintiff paid the £10 only after he had received legal demand therefor, I consider that it is very unlikely that, if plaintiff was satisfied that the £25 had been accepted as dowry, he would have offered a further beast without any pressure having been put upon him to do so. Plaintiff says in his evidence: "*Lobolo* is never fixed but you deliver 6 head and thereafter the balance is demanded." The offer of the beast indicates, in my opinion, that plaintiff knew that the £25 had been paid as damages for seduction and pregnancy so he was offering the beast so that a customary union could be contracted and the fine paid could merge in dowry. As the beast was not accepted it means that no dowry has been paid.

In order to prove that a customary union was contracted, it is also necessary for plaintiff to prove that the woman's father agreed to it. In his evidence plaintiff says: "I first *twalaed* her during 1948. It was with permission of her parents." Then under cross-examination he states: "For permission to *twala* the girl I approached her mother at first. Her father was in East London at the time. Her mother was agreeable but said I must approach her husband Willie Mbebe, but must not mention that I have approached her." This is the only evidence brought by plaintiff to show that the girl's parents consented to a customary union being contracted and, against this, there are emphatic statements by the girl herself, her father and mother, to the effect that they did not agree to a customary union.

It is common cause that the girl went with plaintiff to Cape Town in 1948, and that they afterwards lived together at plaintiff's kraal in the District of Cathcart. Plaintiff says that during 1951, she left him on and off and then left him finally in 1952. The girl's mother says that she came to her in 1951. Her brother says that he was sent to fetch her but does not remember when it was.

However that may be, I consider that whatever presumption may be drawn from the facts that plaintiff paid the father of the girl £15 and she lived with him and had two children by him is stultified by the facts that the girl's father demanded £10 as balance of damages which plaintiff paid, that he then offered a beast which was refused and the girl was taken back to her people but he did not take any steps for her return.

In my opinion, the appeal should be dismissed with costs.

For Appellant: Mr. W. M. Tsotsi, King William's Town.

For Respondent: Mr. Basil Barnes, King William's Town.

SOUTHERN NATIVE APPEAL COURT.

ADAMS *v.* **SKEYI.**

N.A.C. CASE No. 46 OF 1955.

KING WILLIAM'S TOWN: 17th November, 1955. Before Balk, President, Warner and Yates, Members of the Court.

LAW OF PROCEDURE.

Inadmissibility as evidence of entries by former Native Commissioner in office file relating to land transaction—Appeal Court may decide matter exclusive of such inadmissible evidence.

Summary: In an action in which plaintiff sued defendant for the transfer of certain land or, alternatively, for repayment of the purchase price, plaintiff's witness, a land clerk in the Native Commissioner's office, based his evidence on entries by a former Native Commissioner in the office file relating to the land in question.

Held: That the office file cannot be regarded as a public document admissible in evidence on the mere production as proof of the facts shown by the entries therein, in that there appears to be no provision in any relevant legislation requiring a Native Commissioner to satisfy himself of the truth of the entries concerned.

Held further: That the Appeal Court may determine for itself on the admissible evidence in the record whether the decision of the Court *a quo* was or was not correct.

Cases referred to:

Rex *v.* De Villiers 1944 A.D. 493.
Loneo *v.* Smith 9 P.H., F. 1. (C.P.D.).
Bland & Son *v.* Peinke & De Villiers 1945 E.D.L.D. 26.
Estate Lala *v.* Mahomed 1944 A.D. 324.

Appeal from the Court of the Native Commissioner King William's Town.

Balk (President):

This is an appeal from the judgment of a Native Commissioner's Court for plaintiff (now respondent), with costs, in an action in which he sued the defendant (present appellant) for the transfer of a certain piece of land situate in Peelton Location in the District of King William's Town, or alternatively, for the repayment of the purchase price of this land, amounting to £100.

In his particulars of claim the plaintiff averred that:—

"1. The parties hereof are Natives as defined in Act No. 38 of 1927.

2. In or about 1947 plaintiff and defendant entered into an agreement of sale whereby plaintiff purchased from defendant for the sum of £100, certain properties situate in Peelton Location, in the District of King William's Town, i.e. Garden Lot No. 2 B.U. 2 and Building Lot No. 1 B.A. 2.

3. That the said sum of £100 was paid by plaintiff to defendant in full payment of the purchase price of the said properties.

4. That since the date of the said sale defendant has failed and/or refuses to transfer the said property into the name of the plaintiff."

The defendant pleaded as follows:—

"1. Defendant pleads specially that the agreement of sale alleged is unenforceable by reason of the fact that it did not have prior approval of the Chief Native Commissioner as required by section *thirteen* of Proclamation No. 117 of 1931, alternatively:

In the event of the special plea contained in paragraph 1 hereof not succeeding defendant pleads as follows:—

2. Defendant denies all the allegations contained in plaintiff's summons and states that at no time did he enter into any agreement of sale with plaintiff.

3. Defendant states that the said property has never been registered in the name of the late Anderson Adams.

Wherefore defendant prays that plaintiffs' claim be dismissed with costs."

The appeal is brought on the following grounds:—

"(1) That the best evidence was not called by plaintiff (respondent) and that the Assistant Native Commissioner erred in placing undue weight upon the secondary evidence of Alfred Shupingyaneng, unsupported by any testimony of the former Native Commissioner, Mr. Crossman.

(2) That generally the judgment was against the weight of evidence and against the balance of probabilities and accordingly bad in law."

It is unnecessary to consider the point raised in the defendant's special plea since it is not covered by the grounds of appeal.

It appears that the plaintiff's witness, Alfred Shupingyaneng, a land clerk in the office of the Native Commissioner at King William's Town, based his evidence on entries by a former Native Commissioner in the file relating to the land in question. This file cannot, however, be regarded as a public document admissible in evidence on its mere production as proof of the facts shown by the entries therein, in that there appears to be no provision in the relative Proclamation (No. 117 of 1931) nor in any other legislation, requiring a Native Commissioner to satisfy himself of the truth of the entries concerned i.e. entries by him relating to the sale or donation of land of the nature in question or to the registration of the title to such land, see Rex *v.* De Villiers 1944 A.D. 493 at pages 500 to 502. It follows that Shupingyaneng's evidence was inadmissible.

Counsel for respondent contended, that, as no objection had been taken to the admission of this evidence at the time it was received, the appellant could not, on appeal, rely on the fact that inadmissible evidence had been admitted. He cited Loneo *v.* Smith 9 P.H., F.1 (C.P.D.) in support of this contention.

But as I understand the first ground of appeal, the complaint is not against the admission of the inadmissable evidence but in regard to the reliance placed upon this evidence by the Court *a quo*. Moreover the second ground of appeal is on fact.

It therefore seems to me that the proper course here is for this Court to rehear the instant case and to determine for itself on the admissible evidence in the record before it whether the decision of the Court *a quo* was or was not correct, see Bland & Son *v.* Peinke & De Villiers 1945 E.D.L. D. 26 at page 38 and Estate Lala *v.* Mahomed 1944 A.D. 324 at page 330.

Accordingly it remains to be considered whether the plaintiff was entitled to succeed on the evidence exclusive of that of Shupingyaneng.

There are inconsistencies in the plaintiff's case. He averred in his summons that he had purchased the land from the defendant in the year 1947, whereas in his evidence he stated that it was in 1946; and in cross-examination the plaintiff first said that he had used the land for three years only from about 1951 or 1952 and later he stated that he had used the land when he purchased it in 1946. But it seems to me that these inconsistencies are unimportant in the light of what follows.

The Plaintiff's witness, Santi Lupindo, bears out the plaintiff's version that he paid the sum of £100 to the defendant for the land.

The defendant's only witness, other than himself, is, on his own admission in the course of his evidence, an old man with a failing memory.

Then, there are material improbabilities inherent in the defendant's case. As is manifest from the cross-examination of the plaintiff by the defendant's attorney, the defendant's case is that the land was leased and not sold to the plaintiff. But the defendant admitted in his evidence that the plaintiff had paid no rent to him for the land and in cross-examination that he had never claimed any rent from the plaintiff and this over a number of years. The reason given by the defendant for not claiming rent from the plaintiff, viz., because the latter went to his attorney is singularly unconvincing. Moreover the defendant did not, counterclaim for rent and his explanation for not doing so, viz., that this was a matter which rested with his attorneys, is equally lame. To my mind these factors indicate clearly that the probabilities favour the plaintiff's version. It follows that the Court *a quo* cannot be said to have erred in its finding for the plaintiff.

I am therefore of opinion that the appeal should be dismissed with costs but the three months period specified in the judgment of the Court *a quo* is to run from today, the 17th November, 1955, instead of from the date of that judgment.

Warner (Permanent Member): I concur.

Yates (Member): I concur.

For Appellant: Mr. D. Alison, King William's Town.

For Respondent: M. R. D. N. Stanford, King William's Town.

SOUTHERN NATIVE APPEAL COURT.

MAHASHE *v.* MAHASHE.

N.A.C. CASE No. 55 OF 1955.

KING WILLIAM'S TOWN: 17th November, 1955. Before Balk, President, Warner and Yates, Members of the Court.

LAW OF PROCEDURE.

Judicial Officer's discretion as to system of law to be applied—Conditions governing exercise of this discretion—Operation of stare decisis *rule—Position where remedy available under Common Law and not under Native Law discussed.*

Summary: Plaintiff, the brother of the late Moses Mahashe, sued defendants, the heirs in the deceased estate, for £110. 10s., averring that this amount represented the cost of certain building materials which plaintiff had purchased for Moses Mahashe in response to the latter's request for assistance in effecting certain repairs and alterations to his house in the Queenstown location.

The Native Commissioner decided the matter according to Native Law and gave judgment for plaintiff as prayed.

Second defendant appealed against this judgment contending that the matter should have been decided according to the Common Law, and that the plaintiff's claim had become prescribed under the provisions of the Prescription Act of 1943.

Held: That it is only after having heard all the evidence and arguments in the case that the Native Commissioner should have made a final decision as to which system of law to apply.

Held further: That as the existence of a remedy under one legal system, and not under the other, although not the only consideration, is a major factor in arriving at a decision as to which system to apply, it is no more than just that the second defendant, having succeeded to her share of the estate under Common Law, should be allowed a defence open to her under that system but not under the other and the Native Commissioner should therefore at the oenclusion of the hearing have exercised his discretion in that direction and applied Common Law.

Cases referred to:

Ex parte Minister of Native Affairs *in re* Yako *v.* Beyi, 1948, (1) S.A. 388 (A.D.).
Umvovo *v.* Umvovo, 1953 (1), S.A. 195 (A.D.).
Ngqandulwana *v.* Gomba, 4 N.A.C. 132.
Santyisi, N. O. *v.* Msinda, 1935, N.A.C. (C. & O.F.S.), 14.
Letlotla *v.* Bolofo. 1947, N.A.C. (C. & O.F.S.), 16.
Molo *v.* Gaga, 1947, N.A.C. (C. & O.F.S.), 80.
Mfubu *v.* Cembi, 1947, N.A.C. (C. & O.F.S.), 101.
Madolo *v.* Nomawu, 1 N.A.C. 12.
Lebona *v.* Ramokone, 1946, N.A.C. (C. & O.F.S.), 14.
Mbaza *v.* Tshewula, N.O. 1947, N.A.C. (C. & O.F.S.), 72.
Umvovo *v.* Umvovo, 1952, N.A.C. 80 (S).

Statutes, etc., referred to:
Prescription Act No. 18 of 1943 (Sec. 11).
Native Administration Act No. 38 of 1927 [Sec. 23 (9)].
Act No. 6 of 1861 (Cape)—Sec. 3.

Appeal from the Court of the Native Commissioner, Queenstown.

Balk (President):—

This is an appeal from the judgment of a Native Commissioner's Court, given for the plaintiff, as prayed, in an action in which he sued the two defendants for £110. 10s. and costs, averring in his particulars of claim that:—

"1. The parties hereto are Natives as defined by Act No. 38 of 1927.

2. The defendants are the heirs in the estate of the late Moses Mahashe.

3. During 1934 and 1935 the late Moses Mahashe wished to effect certain repairs and alterations to his house in the location and he approached plaintiff with a view to help him purchase certain materials required.

4. Plaintiff duly purchased bricks from one J. Mahlutshana for the sum of £17. 10s. and other material from Messrs. Thomas Baillie, Ltd., for £93.

5. The material so purchased was duly delivered to the late Moses Mahashe and used for his house.

6. The said sum of £110. 10s. has never been repaid to plaintiff and he now claims it from the defendants as joint heirs of the said Moses Mahashe.

Notwithstanding demand having been made the defendants refuse to pay the amount owing.

Wherefore plaintiff prays for judgment in the amount claimed with costs."

In response to a request by the defendants, the plaintiff furnished the following further particulars:—

"1. The bricks were purchased from J. Mahlutshana and delivered to the deceased on the 3rd January, 1935.

2. The purchases from Thomas Baillie, Ltd., were made on the 3rd January, 1935.

3. The plaintiff further states that these purchases were made by him as a result of a request by the head of his family, the late Moses Mahashe, who did not have the necessary funds available to rebuild and renovate the house and so keep the family asset from total ruin."

The first defendant withdrew his appeal so that it is unnecessary to deal with his case except in so far as may be necessary for the purposes of investigating the case between the plaintiff (now respondent) and the second defendant (present appellant).

The second defendant pleaded as follows:—

"The second defendant excepts and specially pleads in terms of Rule 44 (1) to the plaintiff's claim that the same is prescribed by Law and irrecoverable from the second defendant under the provisions of Act No. 18 of 1943 (Prescription Act).

Wherefore the second defendant prays that the plaintiff's claim may be dismissed with costs of suit."

"Should the exception or special plea filed by the second defendant be overruled by the above Honourable Court, the second defendant pleads over to the plaintiff's claim and states:—

1. Paragraphs 1 and 2 of plaintiff's particulars are admitted.

2. In regard to paragraphs 3, 4, 5 and 6 second defendant has no knowledge of the facts alleged, denies the same and puts plaintiff to the proof thereof.

Wherefore second defendant prays that plaintiff's claim may be dismissed with costs of suit."

The grounds on which the appeal is brought by the second defendant, are:—

"1. That the Native Commissioner should have treated plaintiff's claim as one at Common Law and it was, therefore, prescribed under the provisions of the Prescription Act, No. 18 of 1943.

2. That even if the plaintiff's claim be treated as one under Native Custom then it was also prescribed or unenforceable on the ground that for eighteen years and upwards plaintiff never at any time mentioned his claim to any members of his family; and first and second defendants only became aware of the said claim just prior to institution of this action against them thereon.

3. That at a meeting of the next-of-kin of Moses Mahashe plaintiff's brother, held before the said Native Commissioner at Queenstown on the 3rd March, 1955, plaintiff was present and listened to the whole of the proceedings. He did not then mention that he had any claim against his deceased brother, Moses Mahashe.

4. That the Special Pleas of first and second defendants should have been upheld with costs."

At the trial, the defence of prescription was dismissed by the Native Commissioner after he had heard argument but before any evidence had been led, on the ground that Native Law, to which prescription is unknown, should be applied in this case.

This procedure was incorrect as it does not accord with the ruling in *ex parte* Minister of Native Affairs: *In re* Yako *v.* Beyi, 1948 (1) S.A. 388 (A.D.) at page 397 that " he (the Native Commissioner) should only finally decide which system of law he is going to apply (i.e. the Common Law or Native Law) after considering all the evidence and argument as part of his eventual decision on the case;".

In other words it is only after having heard all the evidence and arguments in the instant case that the Native Commissioner should have made a final decision as to which system of law to apply and should thereupon in the light thereof have decided upon the defence of prescription; and should that defence not have been upheld the case should have been disposed of on the merits.

It remains for this Court to consider in which direction the Native Commissioner should have exercised his discretion in regard to the system of law to be applied in the instant case in the light of the above-mentioned ruling and regard being had to the other principles laid down in Yako's case (*supra*) and reiterated in Umvovo *v.* Umvovo, 1953 (1), S.A. 195 (A.D.).

According to the plaintiff's evidence, he assisted his eldest brother, the late Moses Mahashe (hereinafter referred to as " the deceased "), towards the end of the year, 1934, and the beginning of the year 1935, to rebuild his (the deceased's) house on the latter's Stand No. 381 in Queenstown Location, by purchasing at his own expense and supplying him with bricks and other building material to a total value of £110. 10s., which has not been repaid. It also emerges from the plaintiff's evidence, and is not disputed by the defendants, that the first defendant is an illegitimate son of the deceased, that the second defendant is the deceased's widow by a civil marriage, that both defendants are entitled to succeed to the deceased's estate and that the first defendant's rights of succession thereto flow from the deceased's will.

Whilst the basis of the second defendant's right to succeed to the estate is not specifically stated in the evidence and is not clear, it would seem that she is entitled to half of the joint estate of herself and the deceased by virtue of her marriage to him in community of property, as, according to the evidence, the deceased left his whole interest in the above-mentioned stand to the first defendant by will, the second defendant is entitled to the other half of this stand otherwise than by will and the whole estate is being administered under the supervision of the Master of the Supreme Court, i.e. in terms of section *twenty-three* (9) of the Native Administration Act, 1927, as amended.

If Native Law be applied in the instant case, then to succeed in his claim the plaintiff must prove not only that he advanced materials to the value of £110. 10s., to the deceased on the understanding that the latter would repay this amount to him, but

also that the second defendant is the deceased's heir *according to Native Law;* for in Native Law it is only the person who is the heir of the deceased *according to that system of law* who becomes responsible for the deceased's obligations, see Ngqandulwana *v.* Gomba, 4 N.A.C. 132, Santyisi N.O. *v.* Msinda, 1935, N.A.C. (C. & O.F.S.) 14, Letlotla *v.* Bolofo, 1947, N.A.C. (C. & O.F.S.) 16, Molo *v.* Gaga, 1947, N.A.C. (C. & O.F.S.) 80 and Mfubu *v.* Cembi, 1947, N.A.C. (C. & O.F.S.) 101.

It is clear that the second defendant succeeded to half of the estate in question under common law and not according to Native Law since, apart from the reasons given above, she, being a woman, cannot inherit under Native Law, see Madolo *v.* Nomawu 1, N.A.C. 12.

It follows that in the instant action the plaintiff has no remedy against the second defendant under Native Law. Under Common Law, however, he could ordinarily maintain such an action against her and she in her turn could advance the defence of prescription which would not be open to her under Native Law as prescription is unknown to that system of law.

As the existence of a remedy under one legal system and not under the other, although not the only consideration, is a major factor in arriving at a decision as to which system to apply and as it appears to be no more than just that the second defendant, having succeeded to her share of the estate under Common Law, should be allowed a defence open to her under that system but not under the other, viz., the defence of prescription, it seems to me that the Native Commissioner should at the conclusion of the hearing of the instant action have exercised his discretion in that direction and applied Common Law.

Counsel for respondent contended that as the transaction in the instant case was essentially one under Native Law, the Native Commissioner was bound under the *stare decisis* rule to apply that system of law.

In support of this contention, he cited Lebona *v.* Ramokone, 1946, N.A.C. (C. & O.F.S.) 14, Mbaza *v.* Tshewula, N.O. 1947, N.A.C. (C. & O.F.S.) 72, Molo's case (*supra*), Umvovo *v.* Umvovo, 1952, N.A.C. 80 (S) and the following passage from Yako's case (*supra*) at pages 400 and 401:—

> "In this connection reference may be made to the question how far Native Commissioners should regard themselves as being bound to follow the decisions of the Native Appeal Courts in relation to the exercise of the discretion vested in them. The discretion is, of course, a judicial one and where a point on which its exercise would naturally depend has already been unequivocally decided in the Native Appeal Court for the area in which the Native Commissioner's Court is situated, or even in the other Native Appeal Court, it would, I think, be the proper course for the Native Commissioner to follow the decision. For even in matters where discretion operates, the rule of *stare decisis* should in general be observed. This is illustrated by the fact that judges are accustomed to have regard to previous decisions in making orders as to costs, which are usually discretionary. But the Native Commissioner must of course pay principal regard to the facts of the case before him since the dominant consideration is his own reasoned view as to the best system of law to apply in order to reach a just decision between the parties."

The contention that the transaction with which we are here concerned, was purely a Native Law transaction, i.e. that it was so contemplated by the parties thereto, viz., by the plaintiff and the deceased, seems to me to be sound. That this is so becomes evident if the following features, which emerge clearly from the evidence, are borne in mind:—

(1) The plaintiff provided the deceased who was his eldest brother with the building material in question as the latter was the head of the family and they were wont to help each other.

(2) The plaintiff never asked the deceased to repay the cost of the building material nor made any mention thereof; nor did the deceased ever offer such repayment over a period of no less than eighteen years, i.e. from the beginning of the year 1935, when the plaintiff completed providing the building material, until the deceased's death on the 28th July, 1953.

(3) The plaintiff only advanced the instant claim when he found that persons unconnected with his family, i.e. the defendants, were to succeed to the deceased's estate.

These features indicate the absence of a specific agreement or any understanding between the plaintiff and the deceased that the latter would repay the cost of the material and is fully in keeping with Native Law as assistance of this nature, i.e. the provision of building material by a younger brother to the head of his house, is regarded as a voluntary contribution which is not repayable, see Mbaza's case (*supra*) at page 73; whereas the features in question are as a rule foreign to a common law transaction whereby brothers assist one another in this way; for in such a case there would be an immediate specific agreement or a definite understanding that the transaction was to be either a loan or a gift.

That the transaction is one peculiar to Native Law is certainly a factor to be taken into consideration in deciding which system of law to apply; but in the instant case it cannot, to my mind, be regarded as a major factor since, as pointed out above, Native Law affords no remedy in this instance, not only because the second defendant is the heir to her share of the estate according to Common Law and not under Native Law but also because the assistance in question, i.e. the provision of the building material, in the circumstances of this case, like those in Mbaza's case (*supra*), is regarded in Native Law as a non-repayable voluntary contribution; whereas the Common Law does afford a remedy here and as the second defendant's right to succeed to her portion of the estate is derived from that system of law it is no more than just that she should be allowed a defence open to her under that system of law and not under Native Law, viz., the defence of prescription.

Whilst the circumstances in the instant case and those in Mbaza's case are alike, this is not the position in so far as the other cases of this Court cited by counsel for respondent are concerned; and, as in Mbaza's case it was held by this Court that the Native Commissioner had properly applied Common Law, the Native Commissioner ought, following the *stare decisis* rule, also to have applied Common Law in the instant case.

Here it must be pointed out that the last paragraph of the judgment in Mbaza's case at page 74, falls to be viewed in the light of the judgments in Yako's case (*supra*) at pages 395 to 401 and Umvovo *v.* Umvovo 1953 (1) S.A. 195 (A.D.) at pages 199 to 201, from which it is clear that a Native Commissioner has an *unfettered* discretion to apply the one system of law or the other, subject only to two reservations, viz., firstly, that he exercises his discretion judicially and secondly, that he observes the *stare decisis* rule in so far as points on which the exercise of a Native Commissioner's discretion in applying the one system of law or the other depends, have been unequivocally decided by this Court or one of the other Native Appeal Courts, or of course, by the Appellate Division of the Supreme Court. In other words the *stare decisis* rule applies where this or one of the other Native

Appeal Courts, or the Appellate Division of the Supreme Court, has decided that in the particular circumstances of a certain case, say, Native Law should be applied in accordance with the principles laid down in the two Appellate Division judgments quoted above, and like circumstances are present in a subsequent case heard by a Native Commissioner's Court.

Reverting to the instant case, in which, for the reasons given above, Common Law should be applied, the defendant's plea of prescription succeeds in terms of section *eleven* of the Prescription Act, 1943, read with section *three* of Act No. 6 of 1861 (Cape) as it is manifest from the evidence that the cause of action accrued some twenty years ago.

It follows that the appeal succeeds on the first ground and it is unnecessary to consider the remaining grounds.

Accordingly the appeal by the second defendant falls to be allowed with costs and the judgment of the Court *a quo* altered to read: "For plaintiff for £110. 10s., with costs, as against the first defendant. The second defendant is absolved from the instance and awarded costs.'

Warner (Permanent Member): I concur.

Yates (Member): I concur.

For appellant: Mr. T. Stewart, King William's Town.

For Respondent: Mr. Basil Barnes, King William's Town.

NORTH-EASTERN NATIVE APPEAL COURT.

MAHLANGU *v.* MOTHSWENI.

N.A.C. CASE No. 54 OF 1955.

PRETORIA: 9th December, 1955. Before Steenkamp, President, Menge and Cornell, Members of the Court.

PRACTICE AND PROCEDURE.

No provision whereby existing valid judgment of a Chief's Court may be abandoned by the successful party to enable him to institute fresh proceedings in the Native Commissioner's Court—Proper procedure is an appeal by the dissatisfied party.

Summary: Plaintiff sued defendant for the return of his wife failing which the return of the *lobolo* be paid for her and the custody of the children of the union. During the hearing it transpired that the matter in issue had already been tried in a Chief's Court and that a valid judgment was in existence. The question to be decided then became whether a judgment granted by a competent Court may be abandoned and the subject matter made the issue in the Court of a Native Commissioner.

Held: (1) That the proceedings in the Native Commissioner's Court should be set aside as a valid judgment of a competent Court between the parties on the same subject was already in existence.

Held: (2) That there is no provision for the abandonment of a judgment in the Chief's Court Rules and a dissatisfied litigant's only recourse is an appeal to the Native Commissioner's Court if he wishes the judgment to be altered.

Held: (3) That the powers vested in this Court by section No. 15 of the Native Administration Act, No. 38 of 1927, were not intended to allow this Court to supplement defects in the proceedings and rectify them to such an extent that a fatal irregularity would be cured.

Cases referred to:

Prudenza *v.* Prince, 1917, T.P.D. 140.
Mangweli *v.* Sgwene, 1942, N.A.C. (T. & N.) 73.
Charlie Nxele *v.* Lemfara Nxele, 1930 (T. & N.), 111.

Statutes, etc., referred to:

Section *fifteen* of Act No. 38 of 1927.
Form B of the Native Chief's Courts Rules (Government Notice No. 2885 of 9th November, 1951.)

Appeal from the Court of the Native Commissioner, Nebo.

Steenkamp (President) delivering the judgment of the majority of the Court:—

In the Native Commissioner's Court the plaintiff sued the defendant, his brother-in-law, for the return of his wife Sukupi, failing which the return of 13 head of cattle paid as *lobolo* and custody of the two minor children born out of the union.

In his claim the plaintiff avers that the union was entered into during 1942 and that 13 head of cattle were paid as *lobolo* and that during 1950 Sukupi deserted him without just cause.

The facts are common cause with the exception that Sukupi left the plaintiff without just cause and in defendant's plea it is alleged that since shortly after the union plaintiff habitually and cruelly assaulted Sukupi and that this unlawful conduct of the plaintiff rendered continued cohabitation insupportable and dangerous to Sukupi. It is further alleged in the plea that plaintiff in fact chased away the said Sukupi and told her never to come back to him again.

It is common cause that plaintiff is the father of the eldest child, a girl, now aged 10 years but that the second child, a boy of about one year, is the offspring of an act of adultery committed by Sukupi since they parted.

Voluminous evidence was led concerning the alleged ill-treatment of Sukupi by the Plaintiff and the Native Commissioner found proved—

(1) that plaintiff ill-treated Sukupi;

(2) that plaintiff was in the habit of over-indulgence in liquor;

(3 that plaintiff was discharged from his employment as the result of his drinking habits and dishonesty; and

(4) that plaintiff terminated the union by driving Sukupi away.

The Native Commissioner gave the following judgment:—

"1. For defendant with costs.

2. The customary union between the plaintiff and defendant's sister Sukupi is declared dissolved and that the plaintiff forfeits all his rights to the children of the union and the *lobolo* cattle."

The Native Commissioner apparently based the second part of his judgment on defendant's prayer in the plea which reads after amendment:—

"Wherefore defendant prays that plaintiff's summons be dismissed with costs.

(2) That the custody of the two minor children be awarded to Sukupi."

The second paragraph of the prayer only asks for custody but the Native Commissioner has for some reason or other not explained in his reasons for judgment declared, that plaintiff forfeits all his rights to the children.

An appeal has been noted to this Court on the following grounds:—

"(1) That the judgment is against the evidence, and the weight of the evidence delivered in this case.

(2) That his worship the Native Commissioner erred in his judgment more particularly in that the only defence raised by the defendant, was that the co-habitation of the parties had become insupportable and dangerous, and that this defence was not sufficiently proved by the evidence delivered at the trial."

On the first day of the hearing of the case before the Native Commissioner, plaintiff had not completed his evidence and the case was adjourned.

On resumption of the case the plaintiff was legally represented and the following note appears on the record:—

„Mnr. de Villiers deel die hof mee dat hy nou namens die Eiser verskyn en dat daar nou vasgestel is dat daar alreeds 'n behoorlike geregistreerde uitspraak deur die Hof van Kaptein Pony Mahlangu ten gunste van eiser in hierdie saak is. Die Partye het egter ooreengekom dat eiser die uitspraak in sy guns sal laat vaar en dat hulle *de novo* met saak sal aangaan. Mnr. van der Merwe bevestig ooreenkoms."

Both Counsel in this Court argued *in limine* on the question as to whether a judgment granted by a competent Court may be abandoned in the circumstances indicated by the attorneys in the Lower Court.

Counsel for appellant (plaintiff) has mainly confined his arguments on the suggestion that as plaintiff's brother was the Chief who tried the case in his Court he could not, according to Rule 4 of the Native Chief's Courts' Rules judicate upon any matter or thing in which he is pecuniarly or personally interested and that any judgment given in such circumstances is null and void *ab initio* and need not be so declared by a higher Court. This argument does not commend itself to me as apart from the evidence that the Chief was plaintiff's brother there is no evidence that he was pecuniarly or personally interested in the outcome of the case. According to the Chief's evidence he seemed to have acted impartially. He actually fined his brother the plaintiff £5 for not having supported his wife. Moreover this is a point the defendant could have appealed on to the Native Commissioner after judgment had been given against him by the Chief.

Counsel for the respondent has stressed that in the absence of an appeal by the dissatisfied party no judgment, even by consent, could be abandoned. He has quoted the case of Prudenza *v.* Prince, 1917 T.P.D. 140.

The principles laid down in that case have been superseded by certain provisions in the Magistrate's Courts Act and the Native Commissioner's Courts rules but when we come to judgments in a Chief's Court there is no provision for the abandonment of a judgment and a dissatisfied litigant is bound to go to a higher Court to have a judgment altered as laid down in Prudenza's case.

In the instant appeal no appeal had been noted against the Chief's judgment but plaintiff who was the successful party in the Chief's Court saw fit to issue a fresh summons in the Native Commissioner's Court on the same issues already decided in his favour in the Chief's Court and this Court is now called upon to give a ruling as to whether or not the procedure followed is so irregular that it should not be countenanced.

In the case of Mangweli *v.* Sgwene, 1942, N.A.C. (T & N.) 73 the plaintiff, in the Chief's Court, was unsuccessful and he thereupon issued a summons in the Native Commissioner's Court instead of noting an appeal against the Chief's judgment. On the plea of *res judicata* being taken by defendant the Native Commissioner converted the trial from one in the first instance, to an appeal from the Chief's judgment and on that basis the issue was decided. That case can be distinguished in that in the instant case the successful party has issued a summons in the Native Commissioner's Court nothwithstanding that he already has a judgment in his favour obtained in the Chief's Court.

Assuming for a moment that the parties could by consent abandon the Chief's judgment this in my opinion is not sufficient in the absence of an order by the Native Commissioner that the Chief's judgment is cancelled.

As I see it the position as it exists at present is that plaintff might have two judgments in his favour if he succeeds in the present appeal and he may in time to come execute separately on both judgments and obtain satisfaction in each and every judgment recorded separately in each of the two Courts viz. the Chief's Court and the Native Commissioner's Court respectively. Such a position will only be the natural consequence if the procedure followed in the lower Court is sanctioned by this Court.

I have considered the powers vested in this Court by section *fifteen* of the Native Administration Act but have come to the conclusion that there is a limit to that latitude. I do not think it was ever intended that this Court should supplement defects in the proceedings and rectify them to such an extent that what was a fatal irregularity should now be cured.

Counsel for appellant has argued that the Chief who tried the case realised that he should not have done so owing to his brother being party in the case and it was deemed necessary to overcome any further possible implications or repercussions, to commence a case *de novo* in the Native Commissioner's Court. We have no evidence to that effect but even if that was the reason it still does not justify the plaintiff in issuing a fresh summons. Rather should the Chief have advised the defendant in his Court i.e. the present respondent to have noted an appeal to the Native Commissioner's Court.

I have come to the conclusion that the irregular procedure followed in the Court below cannot be allowed to stand and that the proceedings in the Native Commissioner's Court should be set aside.

Both parties are responsible for the abortive proceedings in the Court below and both counsel have agreed that there should be no order as to costs.

I have read the judgment prepared by my brother Menge and I regret I cannot agree with his views that this Court should allow the appeal to be argued on the merits.

Cornell (Member):—

I concur in the conclusions arrived at by the President and agree that the proceedings should be set aside without any order as to costs.

Menge (Acting Permanent Member) dissentiente:—

The facts appear from the judgment of the learned President. I think Mr. Curlewis's contention that the Chief's judgment is valid and that it will remain so until it is set aside on appeal is correct. That leaves for consideration the problem whether two parties to a case decided in a Native Chief's Court can for good reason by agreement abandon the Chief's judgment and, with his consent, proceed *de novo* in the Court of the Native Commissioner. Mr. Curlewis contended that they could not and he cited the case of Prudenza & Co. *v.* Prince, 1917, T.P.D., 140. Mr. van der Spuy, for the appellant (the successful plaintiff in the Court below and in the Chief's Court) felt himself unable to dispute that contention. Both counsel made it clear, however, that they would welcome a decision on the merits, i.e. on the premises that the Native Commissioner was correct in dealing with the matter *de novo* if such a course was legally possible.

The case of Prudenza which Mr. Curlewis cited is not strictly in point. That case decided that the parties to an action cannot, even by consent, abandon a Magistrate's Court judgment with the view to the matter bejng re-heard by the Magistrate. That decision, with respect, is based on the sound principle that the machinery of the law cannot be invoked except to have a dispute or question determined. The Courts are not concerned with anything beyond that or any hypothetical problem. When a dispute has once been decided the Courts are no longer concerned with it for there is no longer anything requiring a decision.

In the ordinary hierarchy of our law courts there is no such thing as a re-trial of a case (apart from the re-trial which a Superior Court may order on appeal). There is no such thing as the abandonment of a decision and making a fresh start, even by consent.

Once a dispute has been decided only an appeal is possible; but that is not a re-trial. On appeal the approach is not as in the Court *a quo* whether A should recover from B; but whether the Lower Court has observed the rules of law and justice in making the particular award appealed against.

But in the case of an appeal from a Native Chief's Court, the procedure is quite different. The Native Commissioner's approach is whether A should recover from B. The question whether or not the Chief observed the correct rules of procedure and whether he applied the law correctly or weighed the evidence properly is beside the point. The Chief's reasons for judgment need not even necessarily be before the Court. There has to be a complete re-trial [see Charlie Nxele *v.* Lemfana Nxele, 1930, N.A.C. (T. & N.), 111].

The agreement of abandonment in the case now before us is not merely for the purpose of obtaining a re-hearing of a matter, which has already been decided, but for the purpose of an appeal on the lines laid down in the rules governing Chief's Courts. Therefore Prudenza's case is not in point.

A case that does seem to be in point is Mohomela Mangweli *v.* Frans Sgwene, 1942, N.A.C. (T & N.), 73. There plaintiff sued *de novo* in a Native Commissioners' Court after a Chief had in the same matter found for the defendant. The latter raised the defence of *res judicata*. The Court, however, proceeded to hear the matter as an appeal and the Chief himself gave evidence. The Native Appeal Court held that the defect in the proceedings had been cured and gave a decision on the merits.

This case should guide us now. In the case before us we do not know what induced the parties to abandon the Chief's judgment. Probably one reason is that the Chief concerned is stated to be the brother of the plaintiff for whom he gave judgment and that he was also his marriage representative. But this is mere conjecture, for beyond the agreement of abandonment which is noted in the record we know nothing about the Chief's judgment or its tenor. It is clear, however, that both parties were for adequate reasons dissatisfied with the Chief's judgment. By agreement they sought to bring the case on appeal without going through the prescribed formalities and incurring the attendant delay and costs. Instead of the clerk of the Native Commissioner's Court issuing a "Notice of Hearing of Appeal" (i.e. form B of the Chief's Courts Rules), he issued a summons in the Native Commissioner's Court. I see no reason why the parties should not waive compliances with procedural rules intended for their protection. The parties were

satisfied with the arrangement, and the Chief apparently too, for he appeared as a witness for plaintiff in the subsequent proceedings. The parties and the Chief are, therefore, estopped from hereafter denying the abandonment of the Chief's judgment. True, the latter has not been specifically set aside; but that was obviously what the Native Commissioner intended, because he could not have envisaged that the two judgments would stand side by side. In this respect the proceedings can easily be corrected by this Court making a suitable order (section *fifteen* of Act No. 38 of 1927).

I consider, therefore, that the abandonment of the Chief's judgment by agreement does not, in the circumstances of this case, invalidate the proceedings in the Native Commissioner's Court, and that the merits of the case can now be argued.

For Appellant: Adv. A. S. van der Spuy (instructed by J. E. de Villiers).

For Respondent: Adv. D. J. Curlewis (instructed by Ferreira & v. d. Merwe).

CENTRAL NATIVE APPEAL COURT.

MAKAQA *v.* **TSHABANGU.**

N.A.C. CASE No. 12 (*a*) OF 1955.

JOHANNESBURG: 15th December, 1955. Before Wronsky, President, Menge and O'Driscoll, Members of the Court.

PRACTICE AND PROCEDURE.

Leave to appeal to the Appellate Division of the Supreme Court on weight of evidence.

Summary: A decision in favour of plaintiff had been given in the Native Commissioner's Court, Vereeniging, in a matter in which plaintiff had claimed a refund of £215 paid as purchase price for a stand in Evaton. This decision was set aside on the weight of the evidence in a unanimous judgment of the Central Native Appeal Court on 24th August, 1955, and absolution from the instance was substituted. Plaintiff thereupon applied for consent to appeal to the Appellate Division.

Held: The amount involved was sufficiently substantial to justify the application.

Held further: As the various points submitted all dealt with questions of fact, the point upon which the matter should go forward is whether or not the judgment of the Native Appeal Court is in accordance with the evidence and the weight of the evidence.

Statutes referred to:

Section 18 (1), Act No. 38 of 1927.

Wronsky, President (delivering judgment of the Court):—

In this action the defendant was sued in the Native Commissioner's Court, Vereeniging, for the refund of £215, being purchase price of Stand No. 1272 in Evaton. The transaction took place some seven years ago. The decision in the matter hinged on the identity of the defendant. After lengthy proceedings the court came to the conclusion that in all the circumstances it was satisfied that the balance of probabilities favoured the plaintiff and accordingly entered judgment for plaintiff as prayed with costs.

An appeal was noted against this judgment on the grounds that "in the particular circumstances of the case sufficient or satisfactory evidence was not adduced from which even on a balance of probabilities the identity of the defendant as the perpetrator of the fraud could justifiably be inferred as proved".

At the hearing of the appeal on the 24th August, 1955, after lengthy analysis of the evidence the Native Appeal Court, in a written judgment, reversed the Native Commissioner's judgment to one of absolution from the instance with costs.

On the 13th October, 1955, respondent submitted the present application seeking this Court's consent to appeal to the Appellate Division of the Supreme Court of South Africa in terms of section 18 (1) of the Native Administration Act, No. 38 of 1927. The petition sets out no less than thirteen grounds on which consent is sought.

In view of the fact that the matter in dispute is one of real importance to the respondent and the amount involved is substantial, particularly so to a Native, this Court feels that it should grant the application.

The application could have been dealt with by this Court during the October session had it been submitted more expeditiously. However, we do not consider that the application is unduly late and no prejudice has been established.

Before us, Mr. Lakier submitted that the matter was an arguable one and that the amount involved was considerable. Mr. L'Ange, for the respondent, conceded both these points but argued that no question of sufficient importance was involved and that an appeal on facts should not be allowed.

Before the case can be placed before the Appellate Division the consent of the Native Appeal Court is to be obtained and that consent is circumscribed by restriction to a stated point.

The petition as set out summarised would amount in fact to an appeal as to whether or not the judgment of this Court is in accordance with the evidence and the weight of the evidence; and this Court consents to an application for leave to appeal in this matter on the point whether or not the judgment of this Court is in accordance with the evidence and the weight of the evidence.

For Applicant: Adv. P. Lakier, instructed by Messrs. Bernard Melman & Company.

For Respondent: Mr. B. L'Ange of Messrs. Steyn, Nolte and Wiid.

OFFICERS OF THE NATIVE APPEAL COURTS.
AMPTENARE VAN DIE NATURELLE-APPÈLHOWE 1955.

NORTH-EASTERN NATIVE APPEAL COURT.
NOORDOOSTELIKE NATURELLE-APPÈLHOF.

PRESIDENT: Ed/Hon. J. H. Steenkamp.

PERMANENT MEMBER/PERMANENTE LID: R. Ashton.

REGISTRAR/GRIFFIER: P. O. Gordon.

CENTRAL NATIVE APPEAL COURT.
SENTRALE NATURELLE-APPÈLHOF.

PRESIDENT: Ed/Hon. { H. F. Marsberg: 1/1/55—21/7/55.
R. Wronsky: 22/7/55—31/12/55.

PERMANENT MEMBER/PERMANENTE LID: W. O. H. Menge.

REGISTRAR: / GRIFFIER: { W. H. King: 1/1/55—28/3/55.
C. S. Schoombee: 29/3/55—30/11/55.
B. Wolvaardt: 1/12/55—31/12/55.

SOUTHERN NATIVE APPEAL COURT.
SUIDELIKE NATURELLE-APPÈLHOF.

PRESIDENT Ed./Hon. { M. Israel: 1/1/55—19/6/55.
H. W. Warner (Acting) 20/6/55–31/7/55
H. Balk: 1/8/55—31/12/55.

PERMANENT MEMBER/PERMANENTE LID: H. W. Warner.

REGISTRAR/GRIFFIER: E. J. Brigg.

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CORRIGENDUM:

(1) N.A.C. REPORTS 1954 Page 143 6th line up from the bottom of the page for the word " obtainable " substitute " Unobtainable ". N.A.C. REPORTS 1955 Page 66 Heading to case NYEMBEZI
(2) *v.* NYEMBEZI AND ANOTHER, for " Appeal " substitute the word " Divorce ".